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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION, PETITIONER

v.

MARY A. CARLSON, ET AL., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

The question presented in this putative nationwide class action is whether the durational limitations on implied warranties expressly allowed by Section 108(b) of the Magnuson-Moss Warranty Act may be rendered unenforceable for virtually all mass-produced products on the grounds that standardized consumer transactions are characterized by "an absence of 'meaningful choice,'" a "disparity in . . . bargaining power," or knowledge of the manufacturer that the product would fail after the warranty period.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Respondents, plaintiffs in the district court and appellants in the court of appeals, are Mary A. Carlson and others (listed individually in App., *infra*, 49a-50a) who seek to represent and purport to be members of a class defined as follows (Amended Complaint ¶ 6):

> all other persons and entities . . . who are or were purchasers or owners (other than for purposes of resale) within six years prior to the filing of this Complaint of new or used 1981-1985 model year GM automobiles or 1981 model year GM light trucks equipped with an eight cylinder 5.7 liter GM diesel engine, and who suffered unreimbursed monetary loss on account of (a) premature substantial or catastrophic engine failure rendering the vehicle unfit for the ordinary purposes of driving and/or (b) with respect to purchasers or owners of new GM diesels only, diminished resale market value, as a result of the defective nature of said diesel engines.

Petitioner General Motors Corporation's subsidiaries (excluding wholly owned subsidiaries) are listed in App., *infra*, 51a-53a.

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

General Motors Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 883 F.2d 287. The opinion of the district court (App., *infra*, 24a-42a) is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1989. Petitions for rehearing were denied on September 27, 1989 (App., *infra*, 43a-45a), and October

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[1] The district court attached to its opinion a 105-page appendix containing the names and allegations of specific individual plaintiffs. That appendix has been omitted from the printed appendix to this petition for a writ of certiorari, but ten copies of the entire district court opinion and appendix have been lodged with the Clerk.

24, 1989 (*id.* at 46a-48a). On December 12, 1989, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including January 22, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 108 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2308, provides:

> (a) No supplier may disclaim or modify (except as provided in subsection (b) of this section) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.
>
> (b) For purposes of this chapter (other than section 2304(a)(2) of this title), implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.
>
> (c) A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this chapter and State law.

STATEMENT

This putative nationwide class action is brought under the Magnuson-Moss Warranty Act, 15 U.S.C. 2301 *et seq.*, which regulates warranties applicable to consumer products sold for more than $5. 15 U.S.C. 2302(e). The Act principally requires meaningful labeling of warranties and clear and conspicuous disclosure of warranty rights and limitations. See 15 U.S.C. 2302, 2308(b). Congress provided that all written warranties

must be labeled as either "full" or "limited" (15 U.S.C. 2303(a)) and set federal minimum standards for "full" warranties (15 U.S.C. 2304), including a requirement that a "full" warranty not limit or disclaim implied warranties, as established by state law (15 U.S.C. 2304(a)(2)). By contrast, Congress expressly allowed "limited" warranties to limit the duration of implied warranties, provided that the limitation is "of reasonable duration," is "conscionable," and "is set forth in clear and unmistakable language and prominently displayed on the face of the warranty." 15 U.S.C. 2308(b). This case involves "limited" automobile warranties that include durational limitations of implied warranties.

The district court dismissed claims under the Magnuson-Moss Act brought by plaintiffs whose automobiles malfunctioned after the durational limitation of their implied warranties, rejecting plaintiffs' contention that these durational limitations should not be enforced under Section 108(b) of the Act, 15 U.S.C. 2308(b). The court of appeals reversed, ruling that allegations of "an absence of 'meaningful choice[s]' and a substantial 'disparity in . . . bargaining power' [are] facts which, if proven, clearly would establish 'unconscionability' " under the Act and thus render the limitations unenforceable. App., *infra*, 14a.

The Fourth Circuit's ruling creates substantial uncertainty and confusion in an area where Congress legislated with the expressed intent to clarify warranty rights and obligations. Since 1975, when the Act became effective, millions of consumer products have been sold annually with implied warranties limited to the duration of the written warranty. Until the decision below, no court had ruled that such a limitation was unenforceable where the duration of the implied warranty was reasonable and the limitation was clearly and conspicuously disclosed. By allowing invalidation of implied warranty durational limitations based on factors that are inherent

in all consumer transactions, the Fourth Circuit has effectively eviscerated the rights expressly provided to manufacturers by Congress and thrown into disarray the carefully circumscribed regulation of warranty disclosures set forth in the Act. The inevitable result will be a litigation explosion and confusion in the marketplace—results that Congress sought to avoid.

A. Proceedings In The District Court

Plaintiffs seek to represent a nationwide class of the nearly 600,000 purchasers of 1981-1985 General Motors (GM) automobiles and light trucks equipped with 5.7-liter diesel engines. The amended complaint, filed in the United States District Court for the District of South Carolina, contains only a single count seeking damages under the Magnuson-Moss Act for breach of the implied warranty of merchantability.

Plaintiffs allege that GM breached the implied warranty by selling motor vehicles with defective diesel engines. The amended complaint concedes, however, that the written warranties from GM limited the duration of that implied warranty to 24 months or 24,000 miles of operation, whichever came first, for model years 1981-1982, and to 36 months or 50,000 miles for model years 1983-1985. It is undisputed that those limitations meet two of the prerequisites for validity under Section 108(b) of the Act, 15 U.S.C. 2308(b): they are of the same duration as the express written warranties, and they are set forth in clear and unmistakable language prominently displayed on the face of the warranties. Nevertheless, plaintiffs contend that the durational limitations are "inoperative under 15 U.S.C. § 2308(b) because (a) [they are] not 'conscionable' and (b) the duration of the written warrant[ies] is not 'reasonable', for reasons generally applicable to all plaintiffs and class members." Amended Complaint ¶ 24.

GM moved to dismiss the amended complaint. The district court dismissed the claims of 106 plaintiffs who alleged no mechanical difficulties until after their warranties had expired. The court rejected the contention of those plaintiffs that they were entitled to sue notwithstanding the expiration of the applicable warranty periods because the durational limitations of the implied warranties were unreasonable and unconscionable. The court cited *Kaplan* v. *General Motors Corp.*, No. 81-CV-1252 (E.D.N.Y. Jan. 21, 1983), one of many decisions upholding one-year/12,000-mile warranties, and observed that the warranties in this case were far longer than those found reasonable in *Kaplan*. App., *infra*, 35a. The court "ha[d] no problem concluding that the time and mileage limits are reasonable and not unconscionable." *Ibid.*

In addition, the district court rejected plaintiffs' argument that they would be entitled to prevail on their unconscionability claim if they could prove that GM knew that its engines might fail sometime after expiration of the warranty period. The court followed the reasoning of *Abraham* v. *Volkswagen of America, Inc.*, 795 F.2d 238, 250 (2d Cir. 1986):

> [V]irtually all product failures discovered in automobiles after expiration of the warranty can be attributed to a "latent defect" that existed at the time of sale or during the term of the warranty. All parts will wear out sooner or later and thus have a limited effective life. Manufacturers always have knowledge regarding the effective life of particular parts and the likelihood of their failing within a particular period of time. Such knowledge is easily demonstrated by the fact that manufacturers must predict rates of failure of particular parts in order to price warranties and thus can always be said to "know" that many parts will fail after the warranty period has expired. A rule that would make failure of a part actionable based on such "knowledge" would render

meaningless time/mileage limitations in warranty coverage.

The district court found that this principle was fully applicable to the implied-warranty issue in this case: "[I]f the court accepted plaintiffs' argument, a plaintiff would need only to show that a manufacturer knew that a product would fail some time after the expiration of the implied warranty in order to recover for unmerchantability. As pointed out by the Second Circuit, this showing would rarely be difficult, and, thus, the time/mileage limitation on the warranty which Congress expressly permits [in 15 U.S.C. 2308(b)] would be rendered meaningless." App., *infra*, 34a-35a.

The district court's ruling permitted those plaintiffs who experienced engine failures during the warranty period to proceed, but it dismissed the claims of the remaining plaintiffs.[2] The court entered judgment against the dismissed plaintiffs under Fed. R. Civ. P. 54(b), thereby permitting immediate appeal. See App., *infra*, 3a n.4.

B. Proceedings On Appeal

The court of appeals reversed and remanded in pertinent part. It concluded that "unconscionability" under 15 U.S.C. 2308(b) could be established despite the "objective reasonableness" of the durational limitations (App., *infra*, 16a-17a) and held that "the district court erred by dismissing the 'unconscionability' claims" (*id.* at 4a).

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[2] The district court also dismissed the claims of 24 plaintiffs for reasons that are not pertinent to this petition. Specifically, the court dismissed the claims of 11 plaintiffs who did not purchase vehicles equipped with 5.7-liter diesel engines. App., *infra*, 27a-28a. The court dismissed the claims of 13 additional plaintiffs who did not allege that they had suffered mechanical difficulties and who claimed that they were entitled to damages for lost resale value. *Id.* at 28a-32a. The claims of the former group were not renewed on appeal; the dismissal of the latter group was affirmed. *Id.* at 20a-22a.

The court of appeals recognized that conscionability is a "question of law" to be decided by the court. App., *infra*, 9a. The court also recognized that, in order to survive GM's motion to dismiss, plaintiffs had to "allege[] facts which, if proven, would have established that the company's duration limitations on implied warranties were indeed 'unreasonable' and 'unconscionable.'" *Id.* at 7a. In seeking to identify facts pleaded by plaintiffs that would meet that standard, however, the court succeeded in listing only factors that characterize almost every consumer transaction.

First, the court of appeals cited a paragraph of the complaint that alleged that consumers cannot obtain better warranty terms from other automakers and therefore have "no meaningful alternative" to accepting GM's standard warranty. In the court's view, GM's use of warranty provisions utilized throughout the automotive industry indicates that "plaintiffs' contractual relationship with GM was tainted by an absence of 'meaningful choice[s]' and a substantial 'disparity in . . . bargaining power'—facts which, if proven, clearly would establish 'unconscionability.'" App., *infra*, 14a.

The court of appeals also referred to "plaintiffs' allegation that 'diesel engines[] are designed to and ordinarily do function for . . . period[s] substantially in excess of th[ose] specified in GM's . . . warranties.'" App., *infra*, 14a-15a. The court did not deny that *all* products are warranted for only a fraction of their expected useful lives, yet it found it "obvious[]" that plaintiffs' allegation "implicates the 'reasonableness' of the durational limitations—hence their effectiveness under § 2308 of the Act." App., *infra*, 15a.

Finally, the court of appeals cited plaintiffs' allegation that GM knew that defects could appear in its diesel engines after expiration of the warranty period. The court below acknowledged the reasoning of the Second

Circuit in *Abraham*, which led the district court to hold that a durational limitation is not rendered unreasonable or unconscionable by the manufacturer's knowledge at the time of sale that a product will eventually fail. The Fourth Circuit dismissed *Abraham*, however, as a case involving express warranties (whereas this case involves implied warranties), without any effort to explain how that distinction could affect the conscionability analysis. App., *infra*, 15a-16a.

In discussing *Abraham*, the court of appeals agreed with GM that a manufacturer's "knowledge of various 'inherent defects' in its products simply has no relevance" when a consumer challenges the "reasonableness" of a warranty limitation. App., *infra*, 17a. But the court concluded that "[d]etermining whether the imposition of warranty limitations was 'unconscionable' . . . requires a court to consider somewhat broader questions," including the "subjective question of whether the manufacturer knew that its product would [fail]" and "the fundamental fairness of the bargaining process." *Ibid.* Thus, according to the Fourth Circuit, "'[o]bjective reasonableness' is [merely] relevant," not dispositive, when the claim is "unconscionability." *Ibid.* The court stated that there exist "separate 'branches' of unconscionability" and that, because 15 U.S.C. 2308(b) refers to both "reasonable[ness]" and "conscionab[ility]," plaintiffs could prevail without showing objective unreasonableness if they could show "procedural unconscionability." *Id.* at 18a n.12.

The Fourth Circuit's recognition of a "procedural unconscionability" standard led it to conclude that unconscionability claims should not be adjudicated without discovery and proof addressed to "the circumstances surrounding the original consummation of [the] contractual relationship." *Id.* at 11a. As the court explained:

> [D]etermining whether isolated contractual language is "unconscionable" requires analysis of the partic-

> ular facts and circumstances surrounding an individual transaction or series of transactions. It is simply irrelevant that other courts may have found, for example, that 12-month/12,000-mile implied warranty limitations are "conscionable," since each case necessarily turns on variable evidence of the "commercial setting" in which challenged disclaimers were imposed.

Id. at 13a n.8. Accordingly, the Fourth Circuit would require inevitably futile but extensive evidentiary hearings "carefully examining all relevant evidence of the setting in which the parties struck their bargain" (*id.* at 11a), including "the fundamental fairness of the bargaining process" (*id.* at 17a) and the "relative 'bargaining power,' 'sophistication,' 'knowledge' and 'expertise' " of the contracting parties (*ibid.*).[3]

REASONS FOR GRANTING THE PETITION

The court of appeals has misconstrued an important federal statute, the Magnuson-Moss Act, in a way that will have intolerable consequences for manufacturers of consumer products throughout the United States. Even though Congress deliberately authorized manufacturers to limit the duration of implied warranties, and even though GM's warranties are far more generous than consumer warranties that consistently have been upheld by the courts, the court below has effectively destroyed the right to limit the duration of implied warranties expressly granted by Congress, thereby exposing GM to the burdens of discovery and class action litigation focused on the circumstances surrounding hundreds of thousands of consumer transactions. Under the lax standard prescribed by the court of appeals—in which allegations of the absence of "meaningful choice" and a "substantial

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[3] The mandate of the court of appeals has issued. On December 12, 1989, however, the district court entered an order staying further proceedings pending the disposition of the petition for a writ of certiorari.

'disparity in . . . bargaining power' " could, "if proven, clearly . . . establish 'unconscionability' " (App., *infra*, 14a)—it is no exaggeration to say that virtually *every* durational limitation of an implied warranty in a consumer transaction is subject to potential invalidation.[4] That incorrect and far-reaching ruling merits further review.

The board scope of the Magnuson-Moss Act leaves no doubt that manufacturers of all consumer products, not just automobiles, will be subject to burdensome litigation under this erroneous rationale. Already, "[w]arranty litigation has exploded" (B. Clark & C. Smith, *The Law of Product Warranties* iii (1984)), and cases like the present one would add the unique complexities of massive class action litigation to that explosion. Furthermore, the court below insisted that such litigation must include inquiry into the "commercial setting" (App., *infra*, 13a n.8) of each of hundreds of thousands of sales transactions. The ability of plaintiffs to engage defendants in such protracted yet fruitless proceedings will foster the filing of nuisance suits solely for their settlement value. See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740 (1975); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345 (1979). This Court should grant review to prevent such a manifest disregard of Congress's intent.

I. THE COURT OF APPEALS MISCONSTRUED THE MAGNUSON-MOSS ACT WHEN IT RULED THAT THE CONSCIONABILITY OF STANDARD WARRANTY LIMITATIONS TURNS ON THE PERCEIVED FAIRNESS OF THE BARGAINING PROCESS.

Section 108(b) of the Magnuson-Moss Act provides that "implied warranties may be limited in duration" if

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[4] In this case, for example, the named plaintiffs drove their automobiles as much as 111,919 miles without incident (see Amended Complaint, App. A, ¶ 32). The decision below precludes dismissal of such claims on the basis of a durational limitation that Congress explicitly sanctioned in Section 108(b) of the Magnuson-Moss Act.

three criteria are met: (1) the time limitation must be coextensive with that of a "written warranty of reasonable duration," (2) the time limitation must be "conscionable," and (3) the time limitation must be "set forth in clear and unmistakable language and prominently displayed on the face of the warranty." 15 U.S.C. 2308(b). The words used by Congress focus on *the contract itself*. There is no suggestion in the language of the Act that Congress intended courts to sift the facts and circumstances surrounding sales of consumer products to determine whether objectively reasonable warranty limitations nonetheless are unlawful.

In view of the statutory focus on the reasonableness and conscionability of the terms of the contract itself, courts consistently have upheld warranty periods far shorter than those at issue here without requiring the parties to engage in fruitless discovery and litigation focused on "the fundamental fairness of the bargaining process" (App., *infra*, 17a).[5] Moreover, as we show be-

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[5] Cases upholding 12-month/12,000-mile automobile warranties against a variety of attacks include *Bush* v. *American Motors Sales Corp.*, 575 F. Supp. 1581, 1583 (D. Colo. 1984) (decided under Magnuson-Moss Act and Section 108(b)); *Taterka* v. *Ford Motor Co.*, 86 Wis. 2d 140, 150-151, 271 N.W.2d 653, 657 (1978); *Christopher* v. *Larson Ford Sales, Inc.*, 557 P.2d 1009 (Utah 1976); *Ford Motor Co.* v. *Moulton*, 511 S.W.2d 690, 693-694 (Tenn.), cert. denied, 419 U.S. 870 (1974); *Tokar* v. *Crestwood Imports, Inc.*, 177 Ill. App. 3d 422, 426-433, 532 N.E.2d 382, 385-389 (1988) (decided under Magnuson-Moss Act); *Norman* v. *Ford Motor Co.*, 160 Ill. App. 1037, 1041, 513 N.E.2d 1053, 1055 (1987) (decided under Magnuson-Moss Act); *Holman Motor Co.* v. *Evans*, 169 Ga. App. 610, 612, 314 S.E.2d 453, 455 (1984); *Hahn* v. *Ford Motor Co.*, 434 N.E.2d 943, 950-953 (Ind. Ct. App. 1982) (decided under Magnuson-Moss Act); *Henderson* v. *General Motors Corp.*, 152 Ga. App. 63, 262 S.E.2d 238 (1979); *Lecates* v. *Hertrich Pontiac Buick Co.*, 515 A.2d 163, 172-174 (Del. Super. Ct. 1986); *Broe* v. *Oneonta Sales Co.*, 100 Misc. 2d 1099, 420 N.Y.S.2d 436 (1978); see also *Landsman Packing Co.* v. *Continental Can Co.*, 864 F.2d 721, 729 & n.11 (11th Cir. 1989) (12-month warranties generally reasonable); *Norman Gershman's Things to Wear, Inc.* v. *Mercedes-Benz of North Amer-*

low, the legislative history of the Magnuson-Moss Act confirms that the open-ended litigation mandated by the court of appeals is at odds with Congress's intent and that Congress fully understood that an implied warranty of reasonable duration is "conscionable" without further inquiry.

A. Congress Intended Courts To Evaluate The Reasonableness Of Warranty Duration, Not The Perceived Fairness Of The Bargaining Process.

Section 108(b) did not originate in the 93d Congress, which passed the Act, but in the 91st Congress.[6] The relevant history makes clear that Congress intended the conscionability standard to invalidate only "unreasonably short" warranty periods in consumer contracts:

> The subsection states that an express warranty will control the duration of implied warranties if the intention to incorporate such a limitation is clearly expressed on the face of the warranty and if the express warranty is of reasonable duration and the limitation is conscionable. This means that in a normal situation an express inconsistent warranty will control and determine the duration of the warrantor's concurrent implied obligations to remedy a defective product. *If, however, the manufacturer gives an unreasonably short express warranty so that the limitation of duration of implied warranty to the express warranty duration would be unconscionable,* then the implied warranties running concurrently with the express warranty (because of the prohibition against disclaimer) could be found to run longer than

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ica, Inc., 558 A.2d 1066, 1072-1074 (Del. Super. Ct. 1989) (upholding 48-month/50,000-mile limitation of implied warranty).

[6] During the 91st Congress, the Senate unanimously passed S. 3074, which contained a Section 9(b) that was identical in all material respects to what is now 15 U.S.C. 2308(b). See 116 Cong. Rec. 22,474 (1970). The House failed to act before that Congress adjourned. In the 92d Congress, the Senate again passed a bill, but the House did not act upon it. No law was passed until the 93d Congress. See S. Rep. No. 151, 93d Cong., 1st Sess. 5-6 (1973).

> the express warranty. For the most part this subsection embodies existing State law. However, *in those situations where an express warranty specifically limits the duration of an implied warranty and that express warranty duration is unreasonably short, subsection (b) of this act prohibits such limitation.*

S. Rep. No. 876, 91st Cong., 2d Sess. 22 (1970) (emphasis added). Consistent with the statement in the Senate Report that conscionability turns on the reasonableness of the "duration" of the express warranty, a later House Report reiterated that "an implied warranty * * * may be limited to the duration of [a] limited warranty *if such duration is conscionable*," and does not mandate an *ad hoc* inquiry into the perceived fairness of the bargaining process. H.R. Rep. No. 1107, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong & Ad. News 7702, 7722 (emphasis added).

Thus, the language and legislative history of the Magnuson-Moss Act leave little doubt that, contrary to the view of the Fourth Circuit, the "conscionability" of warranty limitations turns solely on the reasonable duration of such provisions, not on a standardless evaluation of the disparity in bargaining power between sellers and buyers of consumer products or the facts and circumstances surrounding particular consumer transactions. Significantly, that interpretation also has been endorsed by the staff of the Federal Trade Commission, which Congress empowered to administer and enforce the Act. As stated by the Commission's staff in a publication intended to provide guidance to the business community: "Implied warranties can not be disclaimed *but implied warranties can be limited to the duration of the written warranty if the duration isn't so short that it's unconscionable.*" *Warranties: Making Business Sense Out Of Warranty Law* 8 (1979) (emphasis added).

B. Congress Affirmatively Intended To Permit Manufacturers To Limit Implied Warranties To The Time Periods At Issue In This Case.

As explained above, the Fourth Circuit's construction of the Magnuson-Moss Act is contrary to the language of the statute, the Senate and House Reports, and the views of the staff of the expert agency with rulemaking and enforcement authority under the statute. It is, in addition, plainly at odds with the purposes of the Act, because Congress included Section 108(b) specifically to enable manufacturers to utilize limitation periods of the very type at issue here.

In enacting the Magnuson-Moss Act, Congress seriously considered the proposal that manufacturers of consumer products be prohibited from limiting the duration of implied warranties of merchantability. Early versions of the Act introduced in the 91st Congress would have prevented manufacturers from restricting implied warranties in any way. See, *e.g.*, S. 3074, 91st Cong., 1st Sess. §§ 12, 14, 116 Cong. Rec. 22,475 (1970). But the Senate ultimately rejected that proposal and added a provision—now 15 U.S.C. 2308(b)—"to clarify an issue which has troubled certain representatives of industry" (S. Rep. No. 876, at 22, quoted on pp. 12-13, *supra*). As the Senate Report explained, Section 108(b) provides that "in a normal situation an express inconsistent warranty will control and determine the duration of the warrantor's concurrent implied obligations to remedy a defective product." *Ibid.* The conference committee subsequently accepted a version of the bill that permitted these durational limitations. See H.R. Conf. Rep. No. 1606, 93d Cong., 2d Sess. 25 (1974).

When it authorized manufacturers to limit the time period of implied warranties in consumer contracts, Congress fully understood that manufacturers would confine their warranties to time periods comparable to those at issue in this suit. Indeed, at the time the Magnuson-Moss

statute was passed, the typical automobile warranty (like other consumer product warranties) lasted for only *one year*. See Staff of Subcomm. on Commerce and Finance, House Comm. on Interstate and Foreign Commerce, 93d Cong., 2d Sess., *Staff Report on Consumer Product Warranties, reprinted at* 120 Cong. Rec. 31,317, 31,319-31,321 (1974). See also Arthur Young & Co., *Warranties Rules Warranty Content Analysis* 19 (FTC Staff Report 1979) (12-month warranties were typical immediately before and after passage of Magnuson-Moss).[7] Indeed, an exhaustive empirical survey of the warranties of 28 automakers shows that, immediately before and after passage of the Act, every manufacturer offered warranties no more generous (and most offered warranties

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[7] The hearings on the bills that eventually became the Magnuson-Moss Act contain numerous references to one-year warranties as a prevailing standard. See, *e.g.*, *Consumer Warranty Protection—1973: Hearings on H.R. 20 and H.R. 5021 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess. 153 (1973) (statement of Robert J. Klein, economics editor, *Consumer Reports*) (referring to "the present over-all 12,000-mile or 12-month limit," during which "[t]he great majority of defects in any new car will reveal themselves"); *Consumer Warranty Protection: Hearings on H.R. 6313, H.R. 6314, H.R. 261, H.R. 4809, H.R. 5037, H.R. 10673 (and similar and identical bills) Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. 118 (1971) [hereinafter *1971 House Hearings*] (statement of Fairfax Leary, Jr., Public Interest Research Group); *id.* at 183 (statement of Thomas Nichols, Jr., Gas Appliance Manufacturers Association); *id.* at 442 (statement of L.N. Hunter, Air-Conditioning and Refrigeration Institute); *Consumer Products Guaranty Act: Hearings on S. 3074 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 2d Sess. 46 (1970) (testimony of James Lynn, General Counsel, Department of Commerce); *id.* at 46-47 (remarks of Rep. Sutcliffe); *id.* at 215 (testimony of John J. Nevin, Ford Motor Co.); *id.* at 241 (statement of George Gordin, Jr., National Consumer Law Center, Boston College Law School); see also *id.* at 101 (statement of J. Edward Day, Electronics Industry Association) (two years would be a long warranty).

substantially less generous) than those at issue in this case, in terms of both duration and applicable disclaimers. *Id.* at 67-94.[8]

By affirmatively granting manufacturers authority to limit the duration of implied warranties at a time when one-year express warranties were the "normal situation" throughout the economy, Congress plainly foreclosed the conclusion that more generous warranties of two and three years' duration might be prohibited as unconscionable. Yet that is precisely what the Fourth Circuit has held. The court of appeals' decision thus upsets the policy balance deliberately prescribed in the Magnuson-Moss Act.

C. The Common Law Doctrine Of Unconscionability Embodied In The Magnuson-Moss Act Precludes Invalidation Of Warranty Limitations That Are Objectively Reasonable.

The court of appeals' reliance on factors other than objective unreasonableness to show unconscionability is contrary to express statements of congressional intent. It also is contrary to any legal doctrine that Congress could have intended to incorporate by using the word "conscionable." As the Fourth Circuit recognized (App., *infra*, 10a n.5, 11a), Congress borrowed the concept of conscionability from the common law. Established common law limitations on the conscionability doctrine are therefore relevant in construing 15 U.S.C. 2308(b). *Davis*

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[8] One-year warranties have remained common throughout our economy, as evidenced by the cases cited in note 5, *supra*. See also Vogel, *Squeezing Consumers: Lemon Laws, Consumer Warranties, and a Proposal for Reform*, 1985 Ariz. St. L.J. 589, 593 n.12, 594 n.14, 595 n.24, 601 n.61, 613 n.119. The Federal Trade Commission staff publication designed to guide businesses on compliance with the Magnuson-Moss Act includes an example that presupposes a 12-month/12,000-mile automobile warranty. *Warranties: Making Business Sense Out of Warranty Law*, *supra*, at 27. In California, one year is the *maximum* duration for any implied warranty of merchantability. Cal. Civ. Code § 1791.1(c).

v. *Michigan Department of Treasury*, 109 S. Ct. 1500, 1506 (1989); *Lorillard* v. *Pons*, 434 U.S. 575, 583 (1978). The common law doctrine of unconscionability forecloses the rationale adopted by the court below.[9]

The Fourth Circuit believed that the common law doctrine of unconscionability permits an objectively reasonable warranty term to be invalidated as "unconscionable" on the basis of general allegations of unfairness in the bargaining process. App., *infra*, 17a. The court asserted that contract terms may be invalidated under either of two "branches" of the unconscionability doctrine, and that the word "conscionable" in Section 108(b) corresponds to the *procedural* branch, whereas the statutory term "reasonable" corresponds to the *substantive* branch. App., *infra*, 18a n.12.

There is, however, no common law precedent that invalidates objectively reasonable contract terms simply because they are embodied in form contracts as to which consumers lack "meaningful choice" or equivalent "bargaining power." [10] "Procedural unconscionability" merely

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[9] The court of appeals recognized that plaintiffs' attempt to invalidate the warranty limitations here at issue required a construction of Section 108(b) of the Magnuson-Moss Act. See App., *infra*, 10a n.5 ("§ 2308 of the Magnuson-Moss Act specifically invalidates implied warranty disclaimers which are 'unreasonable' or 'unconscionable'"). Thus, although the federal statute is informed by common law principles embodied in the doctrine of unconscionability, the issue presented is ultimately one of federal statutory policy. See *Walsh* v. *Ford Motor Co.*, 807 F.2d 1000, 1014 & n.79 (D.C. Cir. 1986), cert. denied, 482 U.S. 915 (1987).

[10] See *Restatement (Second) of Contracts* § 208 comment d (1981) ("A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party." Inequality of bargaining power, "together with terms unreasonably favorable to the stronger party," are required to establish unconscionability); B. Clark & C. Smith, *supra*, ¶ 8.03[5], at 8-29 ("a court should be required to find both types of unconscionability [procedural and substantive] before it rewrites the parties' con-

describes a disparity in bargaining power that is necessary—not sufficient—to permit a court to refuse to enforce a contract. The plaintiff *also* must show that the contract is substantively unconscionable. Leff, *Unconscionability and the Code—the Emperor's New Clause*, 115 U. Pa. L. Rev. 485, 502-504, 506, 508, 553 (1967), *cited in* App., *infra*, 18a n.12; see also 1 J. White & R. Summers, *The Uniform Commercial Code*, ¶ 4-3, at 204-207 (3d ed. 1988).

Thus, contrary to the court of appeals' reasoning, "procedural unconscionability" is not in and of itself a ground for invalidating a contract provision. A showing of lack of "meaningful choice" must be *coupled with* a showing that the terms of the contract "are 'so extreme as to appear unconscionable.'" *Williams* v. *Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (D.C. Cir. 1965); Leff, *supra*, 115 U. Pa. L. Rev. at 554.[11] The Fourth Circuit did not suggest that there was anything extreme about the standard warranties at issue here. Instead, it ruled

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tract"); 2 O. Harris & A. Squillante, *Warranty Law in Tort and Contract Actions* § 9.10, at 97 (1989) ("Even in those instances where the buyer is in an inferior bargaining position, there can be no unconscionability unless the seller uses its superior bargaining position to oppress or unfairly surprise the buyer"); Vogel, *supra*, 1985 Ariz. St. L.J. at 602 n.65 ("Generally, both procedural and substantive unconscionability are required for the buyer to prevail").

[11] As the D.C. Circuit explained in *Williams*, "[u]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties *together with* contract terms which are unreasonably favorable to the other party." 350 F.2d at 449 (emphasis added). The "traditional test" deems a contract unconscionable if it is one that "no man in his senses and not under delusion would make on the one hand, and as no honest or fair man would accept, on the other." *Id.* at 450 n.12; accord *Hume* v. *United States*, 132 U.S. 406, 411 (1889). The Fourth Circuit's opinion does not (and could not) suggest that the two- and three-year warranties at issue here fail that standard.

that proof of "an absence of 'meaningful choice[s]'" and "substantial 'disparity in . . . bargaining power,'" *standing alone*, "clearly . . . establish 'unconscionability.'" App., *infra*, 14a. That is neither a correct statement of the doctrine of unconscionability nor an accurate articulation of congressional intent.

II. ALL DURATIONAL LIMITATIONS ON IMPLIED WARRANTIES ARE SUBJECT TO ATTACK UNDER THE FOURTH CIRCUIT'S DECISION.

The court of appeals' sweeping decision throws into question not only the two- and three-year warranties at issue in this case, but virtually all time limitations on implied warranties in the sale of consumer products. No consumer who has purchased a product with a standardized warranty will be unable to make the three allegations on which the Fourth Circuit relied in reversing the district court's dismissal order.

A. A Consumer Plaintiff Can Always Allege Lack Of Bargaining Power.

The court of appeals thought it significant that plaintiffs alleged that they lacked bargaining power relative to GM and had no meaningful choice but to accept standard warranties. The court failed to recognize that consumers never bargain over the terms of warranties. "Reports of consumers who successfully dickered with dealers over a manufacturer's warranty simply do not exist." C. Reitz, *Consumer Protection Under the Magnuson-Moss Warranty Act* 10 (1978) (emphasis omitted).

What the Fourth Circuit has accepted as highly probative evidence of unconscionability, therefore, is a factor typical of the millions of consumer transactions entered into every day. When it decided to permit durational limitations of implied warranties in the "normal situation," Congress was well aware that the circumstances cited by the court of appeals would be present.

"[A]lmost all consumer products sold today are typically done so with a contract of adhesion[;] there is no bargaining over contractual terms." S. Rep. No. 151, 93d Cong., 1st Sess. 6 (1973). See also *Corbin on Contracts* § 559A, at 660 (1989 Supp.) ("the bulk of contracts signed in this country, if not every major Western nation, are adhesion contracts"); *State ex rel. Abrams* v. *Ford Motor Co.*, No. 227, slip op. 8 (N.Y. Nov. 28, 1989) (1989 WL 142651) ("[T]he express warranties accompanying new motor vehicles are surely contracts of adhesion. The terms are not negotiable and a purchaser is often left with the nonchoice—'take it or leave it'—because it is virtually the same for all vehicles and all automakers").

If proof of lack of meaningful choice and lack of bargaining power "clearly . . . establish[es] 'unconscionability'" (App., *infra*, 14a)—as the court of appeals believed—then *every* durational limitation that satisfies the reasonableness requirement of Section 108(b) is nonetheless unconscionable within the meaning of the Act. That cannot be a correct construction of the statute.

B. A Consumer Plaintiff Can Always Allege Failure To Warrant A Product For Its Expected Life.

The court of appeals also reasoned that "plaintiffs' allegation that 'diesel engines[] are designed to and ordinarily do function for . . . period[s] substantially in excess of th[ose] specified in GM's . . . warranties' obviously implicates the 'reasonableness' of the durational limitations." App., *infra*, 14a-15a. Again, that allegation does not differentiate this case from any other case involving a standard consumer warranty. Every such warranty allocates the risks of defects over the expected life of the product between the manufacturer, who bears responsibility in the early years, and the buyer, who bears responsibility in the later years.

There is no basis for thinking that Congress inserted the word "conscionable" in Section 108(b) as a roundabout way to require consumer warranties to cover the entire expected life of a product. To the contrary, Congress was urged to—but did not—include in Magnuson-Moss a substantive provision requiring that warranties cover a specified percentage of the expected life of consumer products. See *1971 House Hearings*, *supra* note 7, at 119 (statement of Fairfax Leary, Jr., Public Interest Research Group). Significantly, even the consumer advocate who unsuccessfully urged such legislation did not go so far as the Fourth Circuit did here. He suggested that 30% or 20% of the estimated useful life of a product would be an appropriate substantive standard for minimum warranty duration. *Ibid.* The court of appeals, by contrast, has reversed a judgment upholding two- and three-year warranties merely because plaintiffs alleged that those warranties did not cover 100% of the expected useful life of the product.

It is therefore no novel feature of this case—but a fact that could be alleged in every case involving a standard consumer warranty—that "express warranties [and the durationally limited implied warranties that accompany them] are generally given for only a fraction of the expected useful life" of a product. Braucher, *An Informal Resolution Model of Consumer Product Warranty Law*, 1985 Wis. L. Rev. 1405, 1426.[12] If the Fourth Circuit's decision is allowed to stand, then the typical warranties

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[12] An empirical study of warranties published in 1981 documents this proposition. For refrigerators, 1-year warranties are typical even though these products have a service life of 15 years. For dryers, 1-year warranties are typical for products with life expectancies of 13-15 years. For gas ranges, 1-year warranties are given for products with 13.5-year life expectancies. For color televisions, 1-year warranties are given for products with 12-year life expectancies. For automobiles, 1-year warranties are given for products with 9.4-year life expectancies. Priest, *A Theory of the Consumer Warranty*, 90 Yale L.J. 1297, 1327 (1981) (table 4).

used in millions of daily transactions would be invalidated as "unconscionable." That plainly is not what Congress intended under Section 108(b).

C. A Consumer Plaintiff Can Always Allege That The Manufacturer Knew That The Product Would Eventually Fail.

The third allegation on which the Fourth Circuit relied is that GM knew of a defect in its products because it realized that, *after its warranty period expired*, some consumers might suffer engine problems. That assertion, however, does not distinguish this case from any other, or from the *Abraham* case decided by the Second Circuit.

The allegation of known defects can be made in every action alleging breach of an implied warranty of merchantability. Such an action is, by definition, one contending that the product was defective at the time of its initial sale.[13] If a manufacturer's knowledge that some of its mass-produced products will fail *after* expiration of the warranty period were enough to make the durational limitation unconscionable, then there would be no such thing as a valid durational limitation.

The Second Circuit squarely rejected this radical theory in *Abraham*. The court refused to adopt a rule that would make failure of a product actionable based on a manufacturer's knowledge that it would fail sooner or later, because to do so "would render meaningless time/mileage

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[13] See 1 J. White & R. Summers, *supra*, § 9-7, at 466 (a necessary element of an action for breach of an implied warranty of merchantability is that the goods "were not 'merchantable' at the time of sale"); Klinger, *The Concept of Warranty Duration: A Tangled Web*, 89 Dick. L. Rev. 935, 950-951 (1985) ("the implied warranty of merchantability relates only to the condition of the goods at the time of sale and not to future performance of the goods"); *Standard Alliance Industries* v. *Black Clawson Co.*, 587 F.2d 813, 820 (6th Cir. 1978) ("implied warranties . . ., by their very nature, . . . never 'explicitly extend to future performance' "), cert. denied, 441 U.S. 923 (1979).

limitations in warranty coverage." 795 F.2d at 250. The Second Circuit explained that "manufacturers must predict rates of failure of particular parts in order to price warranties and thus can always be said to 'know' that many parts will fail after the warranty period has expired." *Ibid.*; see also S. Rep. No. 151, 93d Cong., 1st Sess. 8 (1973). Yet Congress in Section 108(b) deliberately chose to preserve the freedom of manufacturers to set such limitations. See pp. 14-16, *supra*.

The Fourth Circuit attempted to distinguish *Abraham* on the ground that it involved express warranties while this case involves implied warranties. App., *infra*, 15a-16a. But the Second Circuit's refusal to make time/mileage limitations "meaningless" was not dependent upon the fact that the case involved express warranties. Rather, the rule announced in *Abraham*, consistent with Section 108(b), is that in the normal case a manufacturer may impose time/mileage limitations. The rule in the Fourth Circuit, by contrast, is that time/mileage limitations may be found "unconscionable" if the plaintiff proves facts and circumstances that will necessarily be present in every consumer warranty dispute.

In short, the Fourth Circuit's decision throws into question durational limitations on every implied warranty extended in consumer sale transactions. The broad sweep of the decision, its reversal of Congress's determination that durational limitations should be permitted in the normal case, and its inconsistency with the ruling of the Second Circuit all demonstrate that this case merits further review by this Court.

III. THE ADVERSE PRACTICAL CONSEQUENCES OF THE COURT OF APPEALS' DECISION CALL FOR THIS COURT'S INTERVENTION.

The decision of the court of appeals invites an outpouring of meritless warranty litigation in federal and state courts under the Magnuson-Moss Act, burdensome

not only to manufacturers but also to the judicial system. "Warranty litigation has exploded in the last decade" (B. Clark & C. Smith, *supra*, at iii), due in large part to the Magnuson-Moss Act. See Miller & Kanter, *Litigation Under Magnuson-Moss: New Opportunities in Private Actions*, 13 U.C.C. L.J. 10 (1980). Before the Fourth Circuit's ruling, manufacturers and consumers understood that warranties divided responsibility for product failure according to the stated duration of the warranty and that manufacturers were at liberty to limit implied warranties to the duration of reasonable written warranties.[14] The court below has radically changed "the rules of the warranty game" (S. Rep. No. 151, 93d Cong., 1st Sess. 8 (1973).[15]

Every consumer who experiences difficulty with a product can now bring suit alleging breach of the implied warranty of merchantability, even though the warranty has expired under the unambiguous terms of the contract. Litigants seeking a lucrative settlement will be able to embroil manufacturers in litigation, with burdensome discovery, by making boiler-plate claims that they lacked "bargaining power" and "meaningful choice"; that the product was expected to last longer than the warranty period; or that the manufacturer "knew" that some of its mass-produced products would fail after the warranty expired. According to the Fourth Circuit, it makes no difference that the product worked without incident as long as the manufacturer promised that it

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[14] See B. Clark & C. Smith, *supra*, ¶ 8.05[1], at 8-69 (the manufacturer's form contract will "typically limit duration of the implied warranties to that of the written express warranty"); *id.* ¶ 8.01, at 8-4 ("In the real world of consumer warranty forms governed by Magnuson-Moss, . . . the seller usually limits the duration of the implied warranties to that of the written express warranty, as authorized by the federal statute").

[15] Congress passed the Magnuson-Moss Act so that the "rules of the warranty game [will be] clarified" for the benefit of consumers and manufacturers alike. S. Rep. No. 151, 93d Cong., 1st Sess. 8 (1973).

would, or that the stipulated period of warranty protection was objectively reasonable. Simply because consumers lack power to bargain over warranties in standard contracts, it is now open season on such warranties.

This case alone involves an attempt to certify a class purporting to number in the hundreds of thousands, yet it is surely the tip of the iceberg if the decision below stands.[16] The allegations of the complaint in this case would be simple to replicate in most other cases involving products sold to hundreds of thousands or even millions of consumers. The ruling that such allegations suf-

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[16] The Magnuson-Moss Act has led to a dramatic increase in consumer class actions, often involving nationwide classes numbering in the hundreds of thousands. See, *e.g.*, *Deadwyler* v. *Volkswagen of America, Inc.*, 884 F.2d 779 (4th Cir. 1989) (nationwide class action involving 300,000 1976-1979 model year automobiles), petition for cert. pending, No. 89-1036; *Walsh* v. *Ford Motor Co.*, *supra* (putative nationwide class action involving millions of 1976-1979 model year automobiles); *Abraham* v. *Volkswagen of America, Inc.*, *supra* (putative nationwide class action involving all 1975-1979 model year Volkswagen Rabbits); *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir.) (nationwide class action involving hundreds of thousands of 1977 model year automobiles), cert. denied, 444 U.S. 870 (1979); *Skelton* v. *General Motors Corp.*, 661 F. Supp. 1368 (N.D. Ill. 1987) (nationwide class action involving millions of 1976-1980 model year automobiles), aff'd in part, rev'd in part, 860 F.2d 250 (7th Cir. 1988), cert. denied, 110 S. Ct. 53 (1989); *Joseph* v. *General Motors Corp.*, 109 F.R.D. 635 (D. Colo. 1986) (statewide class action involving more than a thousand automobiles); *Alberti* v. *General Motors Corp.*, 600 F. Supp. 1026 (D.D.C. 1985) (purported class action involving all 1980 GM X-cars); *Kaplan* v. *General Motors Corp.*, No. 81-CV-1252 (E.D. N.Y. Aug. 6, 1984) (notice of settlement of action involving hundreds of thousands of 1978-1980 model year diesel automobiles); *Feinstein* v. *Firestone Tire & Rubber Co.*, 535 F. Supp. 595 (S.D.N.Y. 1982) (consolidated purported class actions involving millions of tires); *Garbo* v. *Ford Motor Co.*, 1983-2 Trade Cas. (CCH) ¶ 65,701 (D.D.C. 1982); *Mullins* v. *Ford Motor Co.*, No. 79-2091 (S.D. W. Va. filed Mar. 29, 1979) (purported class action involving "piston-scuffing" in Ford cars); *In re Cadillac V8-6-4 Class Action*, 93 N.J. 412, 461 A.2d 736 (1983) (statewide class action involving thousands of automobiles).

fice to survive a motion to dismiss will invite scores of new nationwide class actions, enmeshing already overburdened federal courts in complex litigation over what "procedural" steps a manufacturer should have taken to assure that its warranty terms would not be adjudged "unconscionable."

Such litigation would by no means be limited to automobiles. Nothing in the opinion of the court of appeals purports to be confined to automobile cases. The opinion is coextensive with the broad coverage of the Magnuson-Moss Act itself, which applies to all "consumer products." 15 U.S.C. 2301(1); see B. Clark & C. Smith, *supra*, ¶ 14.03. Passage of the Act was prompted by concerns about, among other things, household appliances, home entertainment products, automobiles, and motor homes. *Id.* ¶ 14.02, at 14-6. The Act encompasses major home appliances, small home appliances, electronic products, photographic equipment, personal care products, furniture and bedding, power tools, and athletic equipment. Arthur Young & Co., *Warranties Rules Consumer Baseline Study* 16 (FTC Staff Report 1979); Note, *An Empirical Study of the Magnuson-Moss Warranty Act*, 31 Stan. L. Rev. 1117, 1122 (1979). Every one of those products could become the subject of nationwide class actions—or thousands of individual actions—if the decision below is not set aside. Yet "Congress' primary purpose in enacting Magnuson-Moss . . . was to provide minimum disclosure and content standards particularly for written warranties, *not* to actively promote class actions in federal court." *Walsh* v. *Ford Motor Co.*, 807 F.2d 1000, 1007 (D.C. Cir. 1986) (emphasis in original), cert. denied, 482 U.S. 915 (1987).

The possibility of widespread litigation over "defects" appearing long after expiration of product warranties is not what Congress intended. If one takes seriously the Fourth Circuit's statement that "unconscionability" claims require a broad-based inquiry into the "commer-

cial setting" of each transaction (App., *infra*, 13a n.8), then *every* case will require an "opportunity for the parties to present relevant evidence of the circumstances surrounding the original consummation of their contractual relationship." *Id.* at 11a. The ability of plaintiffs to put manufacturers to the expense of such fruitless proceedings will invite the filing of nuisance suits solely for their settlement value. See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. at 740 ("[E]ven a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal. . . . The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant"); *Reiter* v. *Sonotone Corp.*, 442 U.S. at 345 ("District courts must be especially alert to identify frivolous claims brought to extort nuisance settlements. . . . [C]lass-action harassment, or 'windfall' settlements [can be avoided] if the district courts exercise sound discretion and use the tools available").[17]

There is no reason for this Court to permit such untoward results on the basis of a ruling as clearly wrong

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[17] See also *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1018-1019 (2d Cir. 1973) ("Class actions have sprouted and multiplied like the leaves of the green bay tree. . . . [T]he huge and unavoidable expense of producing witnesses and documents pursuant to discovery orders have brought such pressure on defendants as to induce settlements. . . . There is reason to believe that the practical effect of these procedures, and the fact that possible recoveries run into astronomical amounts, generate more leverage and pressure on defendants to settle, even for millions of dollars, and in cases where the merits of the class representative's claim is to say the least doubtful, than did the old fashioned strike suits made famous a generation or two ago"), vacated and remanded on other grounds, 417 U.S. 156 (1974).

as the decision below.[18] The litigation that the Fourth Circuit's ruling would spawn is wholly unnecessary and inappropriate under a statute that Congress demonstrably intended to preserve, not destroy, the freedom of manufacturers to employ reasonable durational limitations on implied warranties of merchantability. S. Rep. No. 876, 91st Cong., 2d Sess. 22 (1970).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Counsel for Petitioner

JANUARY 1990

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[18] The district court's order of dismissal under Rule 12(b)(6) was particularly appropriate in this case, which the court of appeals recognized raises a "question of law" for the court to decide. App., *infra*, 9a. "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law" (*Neitzke* v. *Williams*, 109 S. Ct. 1827, 1832 (1989)) and "streamlines litigation by dispensing with needless discovery and factfinding" (*ibid.*). Rule 12(b)(6) thus has an important role to play in securing the underlying goal of the federal rules: "the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1.

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2168

MARY A. CARLSON; ROMANA STAZEN; KENNETH OWENS; RICHARD B. ALLEN; C.V. ALSTON; CHARLES ARMOUR, JR.; PIERCE BEAUZAY; LEWIS O. BECK; CLAUDE A. BLACK; CHARLES A. BLAU; RAYMOND E. BOOKER; ROBERT L. BRANHAM; THOMAS R. BROWN; DAVIS W. BRUNSON, SR.; WILLIAM E. BUBSEY; JIMMY B. BURRELL; THOMAS H. BURRELL; FRANK CARRUTH; WILLIE CASEY, SR.; JAMES F. CAUSEY; LEVI CHAVOUS; RUTH D. COOKE; JAMES W. DAVIS; JOHN E. DRIGGERS; WILLIAM E. DUKES; ADELAIDE DUPRE; DOUGLAS T. ELKINS; BERNEST ELLERBE; LOIS ELMORE; JOHN ERICKSON; DON EYKYN; MARY J. FAHEY; DR. LESLIE E. FIGA; GEORGE W. FULMER; CHARLAINE GLOVER; LOUISE GRADY; H.M. GRICE; GROOMS OIL COMPANY; DENNIS HARRISON, JR.; JOHN HARTE; DOYLE C. HAYDEN; LILLIAN HAYES; GEORGE HENDRICKS; JESSE HERRON; G.E. HINSON; FLOYD HIOTT; KATHLEEN HOLLIDAY; ROBERT HUDSON; PAUL HUGHES, JR.; ALFREDA JAMES; LARRY JENKINS; HENRY S. JOHNSON; GEORGE C. KOSKO; JIM LEATHENWOOD; ROBERT H. LEHMAN; MICHAEL R. LEPORS; BOBBY G. LOTT; JOE LUBELSKY; T.W. LYBAND; DANIEL L. MCALPIN; DAVID MCLELLAN; PURDY MCLEOD; MARVIN MABRY; WILLIAM MAPP, JR.; ROBERT MARINA, JR.; ELIZABETH J. MARTIN; W. MASON, JR.; GEORGE MASSEY, SR.; SAMUEL MASTERS; ELIZABETH MAUNEY; JAMES E. MAYS; VICKI MAYS; MERLE MELLINS; FRED MEYERS; W. IRVIN MOLONY; DR. CARL MOORE; HARRY MORROW; PHILLIP NOEL; THOMAS O'CONNOR; BILLY PARKER; JACK L. PAYNE; RICH-

ARD PEARL; ZELMA PETTIT; T.H. PRESTON; HAROLD B. PRUITT; RICHARD PUCKHARBER; LAURIE QUINN; ROBERT G. RICHARDS; WALTER L. ROARK, JR.; REV. DANIEL RUNION; OSCAR RUSSELL; ROBERT F. SCHOLL; LIVINGSTON SCOTT; FRANK D. SELLERS; JIMMY SHEORN, JR.; DR. F.L. SHULER; IRENE F. SIMPSON; HENRY R. SIMS; PAUL C. SOVA; ALEX STACKHOUSE, JR.; SUNBELT THREAD & TAPE, INC.; ANN STERNE; JOSHUA TAYLOR; PAUL THODE; ANN THODE; BERNICE TODD; DORETHA J. TODD; MARY TORRENCE; EARLY VINCENT; DONALD WADE; DR. WILLIAM WEATHERS; MRS. DAVID WEIGLE; GEORGE E. WHITE; LEROY WHITE; HORACE WHITMIRE; MARVIN WILLIAMS; DAVID J. WORTHINGTON; ROY C. YOUNG; COLUMBIA WHOLESALE COMPANY; DAVID FERGUSON; ROBERT E. MALPASS; WILLIAM J. SHEPARD, JR.; CARL SHOKES,

Plaintiffs-Appellants,

and

VIVIAN CHESTER; HENRY H. FREUDENBERG; ROBERT GOTTERBA; E.M. HANNA; GERALD HARLEY; S. TODD and JUDY LEWIS; KAREN LUCAS; COURTNEY PLANTE; W.H. SINGLETON; MAJOR R.C. SMITH; BERNETA THAMES,

Plaintiffs,

versus

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the District of South Carolina, at Charleston,
Falcon B. Hawkins, District Judge
(CA-86-2674)

Argued March 6, 1989 Decided August 22, 1989

Before PHILLIPS and CHAPMAN, Circuit Judges, and WILLIAMS, United States District Judge for the Eastern District of Virginia, sitting by designation.

PHILLIPS, Circuit Judge:

This case involves alleged defects in 5.7-liter diesel automobile engines manufactured by the defendant-appellee, the General Motors Corporation (GM), in model years 1981 through 1985. In a seventy-four page amended complaint filed on behalf of 183 named claimants and a prospective class of "similarly situated" car owners [1]—all of whom at one time purchased GM products equipped with diesel engines—plaintiffs charged that the engines were inherently defective and subject to frequent breakdowns, necessitating extensive and expensive repairs. Plaintiffs claimed, moreover, that GM's failure to correct these defects constituted a breach of the implied warranty of merchantability on the engines, hence a remedial violation of the Magnuson-Moss Warranty Act (the Act).[2]

In response to Rule 12(b)(6) motions filed by the defendant, the district court dismissed the claims of 130 of the named plaintiffs. At the same time, it denied plaintiffs' motion to amend the complaint and name additional claimants.[3] This appeal followed [4] and required us to de-

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[1] The named plaintiffs claim that, if they ultimately secure certification of a class, it will include as many as 596,364 current and former owners of GM cars and light trucks. *See* Amended Complaint 8, Joint Appendix at 21-22.

[2] 15 U.S.C. §§ 2301-2312.

[3] The district court's dismissal order threatened the frustration of plaintiffs' prospective ability to obtain class certification. A trial court may certify a Magnuson-Moss class action only if there are, at the time of certification, at least 100 named plaintiffs left in the case. 15 U.S.C. § 2310(d)(3)(C). Here, plaintiffs sought leave to amend their complaint and add parties for the obvious reason that, after entry of the dismissal order, only 53 named claimants remained. *See* Part V, *infra*.

[4] Of course, the proceedings below have not yet come to an end, as the dismissal order left intact the claims of 53 of the original

cide: (1) whether GM diesel car owners who did not themselves encounter engine difficulties are nevertheless entitled to maintain actions for the recovery of "lost resale value"; and (2) whether the district court erred by dismissing the separate claims of some plaintiffs that GM's durational limitations on any and all implied warranties of merchantability were "unreasonable" and "unconscionable." Because we agree with the district court that the implied warranty of merchantability does not encompass claims for "lost resale value," we affirm its dismissal of those plaintiffs who alleged damages attributable only to the "poor reputation" of GM's diesel products. We also hold, however, that the district court erred by dismissing the "unconscionability" claims of other plaintiffs solely on the basis of the pleadings. We therefore reverse as to those claims and remand them for further proceedings.

I

For present purposes, we treat the named plaintiffs in this case as falling into three separate categories: (1) those who alleged that they encountered significant mechanical difficulties with the diesel engines in their GM cars *before* the applicable written warranties had expired; (2) those who alleged that they encountered engine problems only *after* all express warranties had expired; and (3) those who did not specifically allege that *their* diesel vehicles were defective, but instead only that the "poor reputation" of GM's diesel products resulted in compensable losses of "resale value." In a single order, the district court dismissed all named plaintiffs in the latter two categories. Because it did so for conceptually distinct reasons,

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named plaintiffs. In response to a timely motion under Rule 54(b), however, the district court found "no just reason for delay" and entered final judgment against the plaintiffs covered by the order, thereby ripening their appeals. *See* Fed.R.Civ.P. 54(b); 28 U.S.C. § 1291; *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 7-8, 100 S.Ct. 1460, 1464-65, 64 L.Ed.2d 1 (1980).

however, we set out separately the salient facts underlying the claims of each group.

A. *Plaintiffs Claiming that GM's "Durational Limitations" on the Operation of Implied Warranties Were Unreasonable and Unconscionable.*

Included in the first group are those plaintiffs who challenge GM's attempt to impose "durational limitations" on any and all implied warranties covering the diesel-equipped vehicles that are the subject of this dispute.

GM's express warranties on the diesel engines it manufactured in the 1981 and 1982 model years expired by their terms after 24 months or 24,000 miles. For model years 1983 through 1985, all express warranties on the engines expired after 36 months or 50,000 miles. Critical for present purposes, however, is that the warranty documents provided to purchasers of diesel-equipped GM vehicles included provisions purporting also to limit the operation of any *implied* warranties to the periods covered by the express guarantees.

Of the 183 plaintiffs named in the amended complaint, 107 alleged that they had first encountered substantial difficulties with their diesel cars only *after* all applicable express warranties had expired—hence after the purportedly "simultaneous" expiration of any implied warranties. Plaintiffs sought to avoid the obvious difficulties associated with GM's written disclaimers, however, by alleging further that the underlying "durational limitations" on the operation of any implied warranties were, as a matter of law, both "unreasonable" and "unconscionable"—hence "ineffective" under § 2308 of the Act:

> § 2308. Implied warranties.
>
> (a) No supplier may disclaim or modify (*except as provided in subsection (b) of this section*) any im-

> plied warranty to a consumer with respect to [a] consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.
>
> (b) For purposes of this chapter . . ., implied warranties may be limited in duration to the duration of a written warranty of *reasonable duration* if such limitation is *conscionable* and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.
>
> (c) *A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this chapter and State law.*

15 U.S.C. § 2308 (emphasis supplied). In response to GM's Rule 12(b)(6) motion to dismiss, however, the district court held that the implied warranty disclaimers were indeed both "reasonable" and "conscionable." Rejecting plaintiff's claim that "the warranty limitations were unconscionable and of unreasonabl[y limited] duration because GM knew when it sold the cars that the diesel engines were defective," the court reasoned as follows:

> A durational limitation on an implied warranty can mean only that the manufacturer warrants that the car is fit for ordinary purposes only for the duration of that warranty. In other words, the limitation can mean only that the unmerchantability must manifest itself in some manner during the period of the warranty in order for the purchaser to have a cause of action.
>
> If the court accepted plaintiffs' argument, a plaintiff would need only to show that a manufacturer knew that a product would fail some time after the expiration of the implied warranty in order to recover for

> unmerchantability . . . . [T]his showing would rarely be difficult, and, thus, the time/mileage limitation on the warranty which Congress expressly permits would be rendered meaningless.
>
> Turning to the specific limitations periods in this case, the court has no problem concluding that the time and mileage limits are reasonable and not unconscionable. In a class action differing from this case only in the model years of the cars involved, a United States Magistrate found a one-year/12,000 mile warranty limitation reasonable. *Kaplan v. General Motors Corp.*, No. 81-CV-1252 (E.D.N.Y. 1983). The warranties in the instant case last longer than those found reasonable in the *Kaplan* case, and this court finds that the limitations are both reasonable and conscionable.

Carlson v. General Motors Corp., No. 2:86-2674-1, slip op. at 13-14 (D.S.C. April 4, 1988). Plaintiffs now argue that the district court erred by ruling on the unconscionability question solely on the basis of the pleadings. Of course, their ultimate claim is that the amended complaint was sufficient on its face to survive GM's dismissal motion—at least insofar as it alleged facts which, if proven, would have established that the company's durational limitations on implied warranties were indeed "unreasonable" and "unconscionable."

B. *Plaintiffs Seeking Compensation Under the Implied Warranty of Merchantability for "Lost Resale Value."*

The second group of dismissed claimants includes the 17 named plaintiffs who did not allege that they encountered engine difficulties with their own cars, but instead claimed that widespread problems with GM's diesel products had substantially undermined public confidence in *all* diesel-equipped automobiles—and had in turn diminished markedly the "resale value" of the plaintiffs' cars. The district court held, however, that in *no* case may automobile

owners maintain actions for breach of the implied warranty of merchantability if their cars have "operated without incident." *Id.*, slip op. at 7.

> The warranty of merchantability guarantees that the warranted goods are fit for the ordinary purposes for which they are used. Thus, in this case, GM warranted that the cars it manufactured would be fit for driving and transportation. GM did not warrant to each purchaser that every other purchaser's car would be fit. As plaintiffs themselves point out, the alleged loss in resale value results from the poor reputation of the cars[, and] not from a manifest defect in any of the cars which have experienced no mechanical problems.
>
> * * * * *
>
> Only if a plaintiff first establishes that his or her car was of unmerchantable quality might he or she recover damages. Because the[se] plaintiffs . . . cannot establish that their cars were not fit for the ordinary purposes for which cars are used, [their] claims must be dismissed.

Id., slip op. at 10-11. On appeal, these plaintiffs of course renew their argument that lost resale value demonstrably attributable to widespread product failures constitutes "compensable injury" and gives rise to cognizable claims for breach of the implied warranty of merchantability.

II

At the outset, we pause to note that both of the questions presented in this case turn largely on principles of state law—notwithstanding the amended complaint's threshold invocation of a federal statute. Of course, resolution of the claims of both groups of dismissed plaintiffs ultimately requires that we determine the scope of the "implied warranty of merchantability," as that phrase is used in the Magnuson-Moss Warranty Act. As the district court recognized, however, the Act "operates *in conjunc-*

tion with state law to regulate the warranting of consumer products." *Id.*, slip op. at 6 (emphasis supplied). The statute itself defines an "implied warranty" as one "arising under State law (as modified by . . . this title) in connection with the sale by a supplier of a consumer product," 15 U.S.C. § 2301(7), and courts have in turn found it "beyond genuine dispute that, as to both implied and written warranties, Congress intended the application of state law, except as expressly modified by Magnuson-Moss, in . . . breach of warranty actions." *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1013-14 (D.C.Cir.1986). *See also Abraham v. Volkswagen of America, Inc.*, 795 F.2d 238, 247-49 (2d Cir.1986).

Each of the named plaintiffs in this case is a resident of South Carolina, and nearly all of them purchased their GM cars in that state. Like 48 of her sister states, South Carolina has adopted Article 2 of the Uniform Commercial Code (UCC or the Code), *see* S.C. Code Ann. § 36-2-101 et seq., and we therefore must apply relevant provisions thereof to the full extent required for resolution of the substantive questions on which this case turns.

III

We consider first whether the district court erred by dismissing the claims of those plaintiffs who challenged GM's "durational limitations" on the operation of implied warranties.

A

The parties do not dispute that "the question of whether the limitation of a warranty to a designated period is unreasonable or unconscionable may be decided as a matter of law." *Bush v. American Motor Sales Corp.*, 575 F. Supp. 1581, 1583 (D.Colo.1984). Indeed, the rule is mandatory, rather than permissive. By its terms, UCC § 2-302 treats "unconscionability" as question of law; and it is therefore "the court—not the jury—[that] should make the determination of whether designated warranty periods

are 'reasonable' or 'unreasonable.'" *Landsman Packing Co. v. Continental Can Co.*, 864 F.2d 721, 729 (11th Cir. 1989) (reversible error for trial court to instruct jury on "reasonableness" of twelve-month limitation on all warranties). *See also Arkwright-Boston Mfrs. Mut. v. Westinghouse Elec.*, 844 F.2d 1174, 1184 (5th Cir. 1988); *Martin v. Joseph Harris Co., Inc.*, 767 F.2d 296, 299 (6th Cir. 1985).[5]

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[5] UCC § 2-302 provides as follows:

> (1) If the court *as a matter of law* finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

There has been considerable dispute over the applicability of § 2-302 to warranty disclaimers. Some commentators have argued that courts cannot find "unconscionable" those disclaimers which otherwise comply with the technical prerequisites of UCC § 2-316, which requires that implied warranty disclaimers be conspicuous and specific. *See, e.g.*, Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U.Pa.L.Rev. 485, 516-28 (1967). Others have made a strong case that warranty disclaimers which meet the § 2-316 standards still may be found unconscionable under § 2-302. *See, e.g.*, J. White & R. Summers, *Uniform Commercial Code* § 12-11, at 533-38 (3d ed.1988). Most courts have impliedly adopted the latter view and suggested that warranty disclaimers are subject to the § 2-302 unconscionability rules. *See, e.g., Martin*, 767 F.2d at 299.

Of course, the question need not be resolved in the present case, inasmuch as § 2308 of the Magnuson-Moss Act specifically invalidates implied warranty disclaimers which are "unreasonable" or "unconscionable." As the parties apparently have recognized, however, UCC § 2-302 and the numerous cases decided thereunder nevertheless must guide our analysis of whether, as claimed, GM's "durational limitations" on the operation of implied warranties were indeed unconscionable, since the federal statute expressly incorporates relevant principles of state law. *See* Part II, *supra*.

This does not suggest, however, that a trial court can always determine "on the pleadings" whether given contractual language is unconscionable. To the contrary, unconscionability claims should but rarely be determined on the bare-bones pleadings—that is, with no opportunity for the parties to present relevant evidence of the circumstances surrounding the original consummation of their contractual relationship. The gravamen of nearly every such claim is that the parties' initial transaction was in some way tainted by "overreaching"; and it is for this reason that courts have developed "tests" of unconscionability which look, as a matter of necessity, to the presence or absence in a given setting of certain oft-encountered "indicia" of unfair bargaining. One frequently cited case holds, for example, that unconscionability "generally . . . include[s] an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C.Cir.1965). In this circuit, we apply a similar test.

> The factors determining "unconscionability" are various: the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

Kaplan v. RCA Corp., 783 F.2d 463, 467 (4th Cir.1986). Trial courts obviously cannot apply these standards without carefully examining all relevant evidence of the setting in which the parties struck their bargain—and thus cannot resolve *bona fide* questions of unconscionability before the litigants have had an opportunity to present such evidence.

Courts therefore have strictly adhered to the UCC's express requirement that, "[w]hen it is claimed or appears . . . that [a] contract or any clause thereof may be unconscionable[,] the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination." Uniform Commercial Code § 2-302(2). *See, e.g., Williams*, 350 F.2d at 449-50 (full development of record is prerequisite to consideration of unconscionability claim because "[w]hether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction"). The basic principle is of course that, in order to avoid the danger that they might dispose of viable claims prematurely, courts must allow the parties to develop an adequate record. Otherwise, if "no affidavits, interrogatories, depositions, or evidence of any sort ha[ve] been submitted regarding the circumstances surrounding the transaction, [a court] can only speculate as to whether or not [a contractual term] was unconscionable." *Ferrens v. Deere & Co.*, 639 F.Supp. 1484, 1488 (W.D.Pa.1986).[6]

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[6] *See also Luick v. Graybar Electric Co.*, 473 F.2d 1360, 1363 (8th Cir. 1973) (plaintiff always "should be given a reasonable opportunity to present evidence" on his claim of unconscionability, after which "it is *then* within the province of the trial court to determine the issue") (emphasis supplied); Restatement (Second) of Contracts § 208 comment f (1981) ("A determination that a contract or term is unconscionable is made by the court in the light of *all the material facts*. . . . [T]he determination is made 'as a matter of law,' *but the parties are to be afforded an opportunity to present evidence as to commercial setting, purpose and effect* to aid the court in its determination.") (expressly adopting rule of UCC § 2-302) (emphasis supplied). *But see Bush*, 575 F.Supp. at 1583 (rejecting plaintiff's contention that "the reasonableness and conscionability of [warranty] limitations . . . are factual questions that ought not be decided on a motion to dismiss"). *Cf. Farkar Co. v. R.A. Hanson Disc, Ltd.*, 583 F.2d 68, 71-72 (2d Cir. 1978) ("[*i*]*n certain situations* the determination whether a particular provision is 'unconscionable' creates a question of fact"; court goes on to hold that "here we find no facts to support placing

We therefore hold that the district court erred by ruling, solely on the basis of the pleadings, that GM's durational limitations on any and all implied warranties were both "reasonable" and "conscionable" as a matter of law.[7] The court will be equipped to address that question only *after* plaintiffs have had an opportunity—whether in connection with a motion for summary judgment or at trial—to present evidence that, for example, they had no "meaningful choice" but to accept the limited warranties, or that the durational limitations "unreasonably" favored the defendant.[8] That said, we turn to the separate question

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into the 'unconscionable' category the [disputed contractual] provision") (emphasis supplied).

[7] *See Carlson v. General Motors Corp.*, No. 2:86-2674-1, slip op. at 14 (D.S.C. April 4, 1988).

[8] GM's reliance on the several cases in which implied warranty disclaimers have been upheld against "unconscionability" challenges is simply misplaced. As indicated, determining whether isolated contractual language is "unconscionable" requires analysis of the particular facts and circumstances surrounding an individual transaction or series of transactions. It is simply irrelevant that other courts may have found, for example, that 12-month/12,000-mile implied warranty limitations are "conscionable," since each case necessarily turns on variable evidence of the "commercial setting" in which challenged disclaimers were imposed.

As noted above, the district court had "no problem concluding that the time and mileage limits are reasonable and not unconscionable." *Carlson v. General Motors Corp.*, No. 2:86-2674-1, slip op. at 14 (D.S.C. April 4, 1988).

> In a class action differing from this case only in the model years of the cars involved, a United States Magistrate found a one-year/12,000 mile warranty limitation reasonable. *Kaplan v. General Motors Corp.*, No. 81-CV-1252 (E.D.N.Y. 1983) [unreported]. The warranties in the instant case last longer than those found reasonable in the *Kaplan* case, and this court finds that the limitations are both reasonable and conscionable.

Id. As the appellants point out, however, *Kaplan* is extremely doubtful precedent—even given the similarity of its facts—inasmuch as the magistrate's report was neither adopted nor even considered by the district court. Shortly after the report was filed,

of whether there are nevertheless, as GM claims, alternative grounds on which we could affirm the dismissal order here at issue.

B

The argument is straightforward. It is that, while the dismissed plaintiffs might well have been entitled to go forward and present evidence in support of a "facially viable" claim, their amended complaint simply "fail[ed] to allege any facts from which it would appear that the [durational] limitation[s] [were] unconscionable." Appellee's Br. at 25.

On our reading, however, the amended complaint more than sufficiently particularizes the alleged "overreaching." It specifies ten separate "reasons" why GM's imposition of durational limitations on the operation of implied warranties was both "unreasonable" and "unconscionable." Plaintiffs alleged, for example, that "[d]ue to unequal bargaining power and lack of effective warranty competition among dominant firms in the automobile manufacturing industry, [purchasers] had no meaningful alternative to accepting GM's attempted limitation of the duration of the implied warranty." Amended Complaint ¶ 24(d); J.A. at 27-28. Here, the claim is that the plaintiffs' contractual relationship with GM was tainted by an absence of "meaningful choice[s]" and a substantial "disparity in . . . bargaining power"—facts which, if proven, clearly would establish "unconscionability." *See Kaplan*, 783 F.2d at 467; *Williams*, 350 F.2d at 449. Similarly, plaintiff's allegation that "diesel engines[] are designed to and ordinarily do function for . . . period[s] substantially in excess of th[ose] specified in GM's . . . war-

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the parties in *Kaplan* settled out of court. In any event, *Kaplan* and its sister cases offer little help to us here. Notwithstanding what other courts may have done, the district court in this case should have undertaken independent analysis of the plaintiffs' "unconscionability" claims—based, of course, upon evidence in an adequately developed record.

ranties" obviously implicates the "reasonableness" of the durational limitations—hence their effectiveness under § 2308 of the Act. *See* Amended Complaint ¶ 24(a); J.A. at 27.

Perhaps most significantly, plaintiffs also alleged that GM knew of inherent defects in its diesel engines—but failed to warn its customers of the consequential likelihood of "catastrophic failures." *See* Amended Complaint ¶ 24(c); J.A. at 27. The claim is, of course, that GM imposed its durational limitations on the operation of implied warranties in the course of bargaining tainted by the "concealment of relevant facts"; that, *ipso facto*, plaintiffs had no "meaningful choice" when they accepted the limitations; and that the disclaimers themselves were therefore unconscionable as a matter of law. *Williams*, 350 F.2d at 449. GM argues vigorously, however, that its alleged "knowledge" of various defects—even if proven—has no bearing whatsoever on the "reasonableness" of its warranty disclaimers.

The district court apparently agreed. It relied on the following passage from a recent Second Circuit decision, on which GM now stakes much of its case:

> [V]irtually all product failures discovered in automobiles after expiration of the [express] warranty can be attributed to a "latent defect" that existed at the time of sale or during the term of the warranty. All parts will wear out sooner or later and thus have a limited effective life. Manufacturers always have knowledge regarding the effective life of particular parts and the likelihood of their failing within a particular period of time. . . . A rule that would make failure of a part actionable based on such "knowledge" would render meaningless time/mileage limitations in warranty coverage.

Abraham v. Volkswagen of America, Inc., 795 F.2d 238, 250 (2d Cir.1986). We think *Abraham* is clearly dis-

tinguishable, however, at least insofar as the plaintiffs there challenged the "reasonableness" of durational limitations on *express* limited warranties. The claim in this case is different. The plaintiffs here allege that, even if GM's limitations on express warranties were of "reasonable" duration, its knowledge of certain "inherent defects" in the diesel engines rendered all parallel limitations on *implied* warranties "unconscionable."

As should be clear, the crucial distinction is that drawn by the express terms of § 2308 between the "reasonableness" of limitations on express warranties and the "conscionability" of accompanying limitations on *implied* warranties. GM argues that therein lies no meaningful difference, inasmuch as § 2308 of the Act expressly authorizes limitations of implied warranties to the duration of "reasonably" limited express warranties. What the company ignores, however, is that the statute authorizes such limitations only if they are *also* "conscionable." [9]

The concepts of "reasonableness" and "conscionability" are obviously related; but for present purposes there are also, as suggested, certain critical differences. Determining whether temporal warranty limitations are of "reasonable duration" requires the court to determine nothing more than for how long, given past experience, consumers legitimately can expect to enjoy the use of a product "worry-free." Courts should focus, in other words, on whether purchasers should "reasonably" expect that, after a certain period, the product might well need repair. Herein lies the essence of plaintiffs' claim that "diesel engines[] are designed to and ordinarily do function for . . . periods substantially in excess of th[ose] speci-

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[9] "For purposes of this chapter . . . , implied warranties may be limited in duration to the duration of a written warranty of *reasonable* duration, if such limitation is *conscionable* . . . ." 15 U.S.C. § 2308 (emphasis supplied).

fied in GM's . . . warranties"; [10] and we must agree that, in the face of this threshold challenge only to the "reasonableness" of the warranty disclaimers, GM's alleged knowledge of various "inherent defects" in its products simply has no relevance. *See Abraham*, 795 F.2d at 250. Considered in isolation, the claim presents but one, purely objective question: *viz.*, whether it is "reasonable" to expect a diesel engine supplied by any manufacturer to operate "without incident" for a given period of time. Here, the separate, subjective question of whether the manufacturer knew that its product would not meet those expectations simply need not—and indeed should not—ever arise.

Determining whether the imposition of warranty limitations was "unconscionable," however, requires a court to consider somewhat broader questions. "Objective reasonableness" is certainly relevant; [11] but so also is the fundamental fairness of the bargaining process. Indeed, it is for this reason that, when presented with a claim that the inclusion of certain contractual terms constituted unconscionable "overreaching," courts typically look to the parties' relative "bargaining power," "sophistication," "knowledge" and "expertise"—all of which constitute relevant evidence of whether their ultimate transaction was indeed tainted by an "absence of meaningful choice." *See Kaplan*, 783 F.2d at 467; *Williams*, 350 F.2d at 449. Surveying the cases, one noted treatise observes that "judicial finding[s] of lack of 'meaningful choice' . . . [are] usually founded upon a recipe consisting of one or more parts of assumed consumer ignorance and several parts of seller's guile"; and it is at this level that courts have necessarily cast "unconscionability" in largely *subjective* terms. J. White & R. Summers, *Uniform Commercial Code* § 4-3, at 187 (3d ed. 1988). Relevant in

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[10] *See* Amended Complaint ¶ 24(a); J.A. at 27.

[11] *See, e.g., Williams*, 350 F.2d at 449 (contract terms unconscionable if "unreasonably favorable" to one party or the other).

any such case are specific allegations that a seller abused his "superior knowledge" and the buyer's relative ignorance, or that the seller's actions were in some other way akin to "fraud or duress in contract formation"—the claim of course being that such behavior implicates the seller's subjective good faith, the "evenhandedness" of the bargaining process, and thus the "conscionability" of challenged contractual language. *See id.* at 186.[12]

Here, proof that GM knew of and failed to disclose major, inherent product defects would obviously suggest that its imposition of the challenged "durational limitations" on implied warranties constituted "overreaching,"

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[12] We note in passing that several commentators have drawn distinctions similar to that between what we have called "objective reasonableness" and "conscionability." Most would treat the concepts as variations on the same theme, however, and denominate them "subspecies" of "general unconscionability." White and Summers, for example, distinguish between "procedural" and "substantive" unconscionability.

> Substantive unconscionability involves those one-sided terms of a contract from which a party seeks relief (for instance, "I have the right to cut off one of your child's fingers for each day you are in default"), while procedural unconscionability deals with the process of making a contract—"bargaining naughtiness" (for instance, "Just sign here; the small print on the back is only our standard form"). Each of these branches of unconscionability has common-law cousins; procedural unconscionability looks much like fraud or duress in contract formation, and substantive unconscionability reminds us of contracts or clauses contrary to public policy or illegal.

J. White & R. Summers, *Uniform Commercial Code* § 4-3, at 186 (3d ed. 1988) (footnote omitted). *See also* Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U.Pa.L.Rev. 485, 487 (1967) (distinguishing between allegations of "bargaining naughtiness" and inclusion of objectively "harsh" contractual terms). This distinction between separate "branches" of unconscionability obviously corresponds closely to the differentiation suggested in the text between "objective reasonableness" and general "unconscionability"—terms we have used only because they are suggested by the language of § 2308. *See* note 9, *supra*, and accompanying text.

and that the disclaimers themselves were therefore "unconscionable." When a manufacturer is aware that its product is inherently defective, but the buyer has "no notice of [or] ability to detect" the problem, there is perforce a substantial disparity in the parties' relative bargaining power. *Martin*, 767 F.2d at 302. In such a case, the presumption is that the buyer's acceptance of limitations on his contractual remedies—including of course any warranty disclaimers—was neither "knowing" nor "voluntary," thereby rendering such limitations unconscionable and ineffective. *Id.* at 301 (citing *Johnson v. Mobil Oil Corp.*, 415 F.Supp. 264, 269 (E.D.Mich.1976)). Evidence of the "knowledge of [a] stronger party that the weaker party will be unable to receive substantial benefits from the contract"—or any related showing that "the transaction involved elements of deception"—should in most cases "contribute to a finding of unconscionability in the bargaining process." Restatement (Second) of Contracts § 208 comment d (1981). *See also* 15 W. Jaeger, *Williston on Contracts* § 1763A, at 224 (1972) (by definition, unconscionability includes "the procedural abuse of unfair surprise, usually manifested as a concealment of important facts"). That is in large measure what the plaintiffs here have claimed; and we therefore cannot say that their amended complaint failed to allege facts which, if proven to the court's satisfaction, could establish that, as a matter of law, GM's durational limitations on the operation of implied warranties were indeed unconscionable.

We therefore hold that the district court erred by dismissing the claims of those named plaintiffs who alleged that they first encountered substantial difficulties with their diesel-equipped GM cars only after the purported expiration of all express and implied warranties. In so doing, we express no opinion and intimate no view on what may be proven on the matter, as opposed to what we have held was, at this stage, adequately pleaded to withstand the Rule 12(b)(6) motion.

IV

The remaining substantive question is whether the district court also erred by dismissing those plaintiffs who alleged damages based solely on the "diminished resale value" of their diesel-equipped GM cars.

We think it fair to say that plaintiffs' theory here is a novel one. Indeed, they cite no case in which a court has specifically held that the implied warranty of merchantability protects against unanticipated losses in resale value. Instead, plaintiffs rely primarily on cases in which: (1) courts certified or upheld the certification of nationwide classes whose members included "all owners" of an allegedly defective vehicle; and (2) the damages allegedly suffered by the members of such a class included "diminished resale value."

We find these cases singularly unhelpful, however, for the simple reason that in not one did a court address the substantive question of whether the implied warranty of merchantability protects against an unanticipated diminution in secondary market values. To the contrary, most of the courts specifically reserved that question for decision at another, more appropriate time—i.e., outside the context of rulings on Rule 23 motions for class certification. In *Walsh v. Ford Motor Co.*, 106 F.R.D. 378 (D.D.C.1985), for example, the trial court certified an "all owners" class of plaintiffs, notwithstanding the defendant's protestation that many of the class members' cars had "performed as warranted and therefore [were] merchantable." *Id.* at 396. The court specifically noted, however, that it was certifying the class solely on the basis of the "commonality" of the prospective members' interests, and that it was *not* determining separately whether the plaintiffs had stated a "viable" cause of action for breach of the implied warranty of merchantability. *Id.* at 397. Essentially the same can be said for each of the remaining cases on which the plaintiffs principally rely.

See In re Cadillac V8-6-4 Class Action, 93 N.J. 412, 461 A.2d 736, 743 (1983) (approving certification of "all owners" class where plaintiffs charged breach of implied warranty of merchantability on account of "common defect"; court holds that allegation of "loss-of-bargain" damages is sufficient to state cause of action, but relies on cases where such loss occurred as result of manifest defects in *Plaintiffs'* cars); *Landesman v. General Motors Corp.*, 42 Ill. App.3d 363, 1 Ill. Dec. 105, 107-08, 356 N.E.2d 105, 107-08 (1st Dist.1976) (court certified class of plaintiffs claiming damages partly attributable to diminished resale value, but specifically declined to decide question of whether allegations supported viable cause of action); *Anthony v. General Motors Corp.*, 33 Cal.App.3d 699, 109 Cal.Rptr. 254 (2d Dist.1973) ("all owners" class certification; no discussion of viability of underlying cause of action).

Finding no real support for their position in the cases, plaintiffs are therefore left with the bare language of § 314 of the Code, which defines and gives shape to the "implied warranty of merchantability." Under § 314(2)(c), "[g]oods to be merchantable must be at least such as . . . are fit for the ordinary purposes for which such goods are used." Predictably, plaintiffs argue from this that, since "[o]ne of the ordinary purposes . . . of purchasing new automobiles . . . is to be able to resell the car eventually," Appellant's Br. at 35, the implied warranty of merchantability encompasses "loss of resale value" claims.

We are not persuaded, however, that § 2-314 reaches nearly that far. The difficulty is that, so far as these plaintiffs are concerned, GM's diesel-equipped cars have served the traditionally recognized "purpose" for which automobiles are used. Since cars are designed to provide transportation, the implied warranty of merchantability is simply a guarantee that they will operate in a "safe condition" and "substantially free of defects." *Overland Bond & Invest. Corp. v. Howard*, 9 Ill.App.3d 348, 352, 353,

292 N.E.2d 168, 172-73 (1st Dist.1972). Thus, "where a car can provide safe, reliable transportation[,] it is generally considered merchantable". *Taterka v. Ford Motor Co.*, 86 Wis.2d 140, 271 N.W.2d 653, 655 (1978). So defined, "merchantability" clearly does not encompass consumer expectations that a product will hold its value; and it is for this reason that several courts have rejected claims similar to those pressed here. *See, e.g., Yost v. General Motors Corp.*, 651 F.Supp. 656, 657-58 (D.N.J.1986) (dismissing claim for breach of implied warranty of merchantability on automobile engine where plaintiff failed to allege any actual mechanical difficulties with his car); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F.Supp. 595, 602 (S.D.N.Y.1982) (no claim under implied warranty of merchantability on tires where plaintiffs experienced no failures); *Skelton v. General Motors Corp.*, 500 F.Supp. 1181, 1191-92 (N.D.Ill.1980) (no claim for breach of implied warranty of merchantability where plaintiffs alleged that concealed substitution of certain transmissions for others advertised as standard equipment rendered automobiles "less desirable to the purchasing public"), *rev'd on other grounds*, 660 F.2d 311 (7th Cir.1981).

We simply cannot say that the implied warranty of merchantability encompasses more than these courts have held, and we therefore affirm the district court's dismissal of those plaintiffs who alleged damages attributable only to "lost resale value."

V

We turn finally to the appellants' claim that the district court should have granted plaintiffs' motion to amend their complaint and add a sufficient number of new parties to satisfy prospectively the 100-named-plaintiffs requirement for certification of a Magnuson-Moss class action.

In view of our overall disposition of the case, we think it would not be helpful—certainly it is not now necessary

—to address this contention. On the remand we will order, the claims of all those plaintiffs who challenged GM's "durational limitations" on the operation of implied warranties will be revived. At that point, there will again be more than 100 named plaintiffs with live claims to pursue, thereby satisfying the statutory precondition to class certification without any need—at least for that reason—to add more plaintiffs by amendment.[13] While it is of course possible that later developments may again lead to dismissals reducing the number of named plaintiffs to less than 100, any motion for the allowance of amendments at that point would present so different a set of considerations that anything we said about the propriety of disallowing the earlier motions to amend would probably be beside the point.

VI

In summary, we reverse that portion of the district court's order dismissing the claims of those plaintiffs who alleged breaches of warranty by reason of mechanical difficulties occurring after the purported expiration of all express and implied warranties; we affirm that portion dismissing the claims of those plaintiffs who alleged breaches of warranty solely by reason of diminutions in resale value; and we remand the case for further proceedings consistent with this opinion.

SO ORDERED.

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[13] An attachment to the district court's dismissal order lists 108 named plaintiffs who alleged that they encountered difficulties with their diesel-equipped GM cars only after the purported expiration of express and implied warranties. *See* J.A. at 276-78. It would appear, therefore, that our disposition of this appeal leaves intact the claims of 161 of the plaintiffs named in the amended complaint: 108 who challenged the "durational limitations" on implied warranties, and 53 who were not covered by the Rule 12(b)(6) order.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Civil Action #2:86-2674-1

MARY CARLSON, *et al.*,
Plaintiffs,

vs.

GENERAL MOTORS CORPORATION, a Delaware corporation,
Defendant.

ORDER

[Filed Apr. 4, 1987]

This case was commenced on October 9, 1986 by the filing of a complaint on behalf of a class of approximately 600,000 purchasers of automobiles manufactured by defendant General Motors Corporation (GM). The automobiles in question were model years 1981-1985 and contained 5.7 liter diesel engines which the plaintiffs claim were defective. The jurisdictional basis for the complaint is the Magnuson-Moss Act, 15 U.S.C. §§ 2301-2312 (1982). The original complaint named one hundred one (101) plaintiffs and alleged breach of the implied warranty of merchantability and unfair trade practices. On January 27, 1987, the plaintiffs filed an amended complaint which named one hundred twenty-nine (129) plaintiffs and alleged only the breach of the implied warranty of merchantability.

On February 26, 1987, GM filed a motion to strike the amended complaint and an alternative motion to dismiss

the amended complaint. The plaintiffs responded to these motions with a motion to add and drop parties and a second motion to add parties. A hearing was held in Charleston, South Carolina, on December 3, 1987, after which the court took the four motions under advisement. Having fully considered the briefs of the parties and the oral arguments made at the December 3, 1987 hearing, the court turns now to the disposition of the motions.

I. *Motion of GM to strike the amended complaint and the motions of plaintiffs to add and drop parties and to add parties*

GM seeks to strike the amended complaint on the grounds that Fed.R.Civ.P. 21 requires leave of court for the addition of new parties. Plaintiffs respond that Fed. R.Civ.P. 15 permits a party to amend a complaint without leave of court if no responsive pleading has been filed.

Fed.R.Civ.P. 21 instructs that the court may add parties at any stage of the case upon motion of a party on such terms as are just. To disallow the addition of new parties at this relatively early stage of the proceeding would serve no purpose other than protraction of this litigation. The court concludes that the addition of parties at this point in the case furthers the ends of justice. Therefore, GM's motion to strike will be denied, plaintiffs' motion of March 26, 1987 to add and drop parties will be denied, and plaintiffs' motion of December 1, 1987 to add parties will be granted.[1]

II. *Motion of GM to dismiss the amended complaint*

In order to maintain a class action under the Magnuson-Moss Act, 15 U.S.C. §§ 2301-2312 (1982), the com-

[1] The amended complaint dropped four plaintiffs and added thirty-two plaintiffs. The plaintiffs' motion to add and drop parties filed on March 26, 1987 seeks to add and drop these same parties. Therefore, the denial of GM's motion to strike renders the plaintiffs' March 26, 1987 motion moot, resulting in the denial of that motion.

plaint must name at least one hundred plaintiffs. In its motion to dismiss, GM claims that a majority of the named plaintiffs[2] have facially invalid claims. If these claims are not counted towards satisfaction of the 100-named plaintiff requirement, then the requirement is not met.

In *Walsh v. Ford Motor Co.*, 588 F. Supp. 1513 (D.D.C. 1984), the defendants made a similar motion to dismiss in a Magnuson-Moss Act case. In addressing the motion, the court held:

> [I]n order to comply with the exclusionary purposes of the Act, which are designed to limit the numbers and kinds of cases brought in Federal court, [the court] must look closely at each plaintiff to determine whether he states a claim for relief before he may be counted towards meeting the 100-named plaintiff requirement. Without making that inquiry, the jurisdictional prerequisites established by Congress could be easily circumvented by merely joining 100 individuals who may or may not have a valid claim for relief.

Id. at 1520. A plaintiff whose case could not survive a motion to dismiss if the case were brought individually should not be able to survive a motion to dismiss simply because the claim is joined in a class action with the claims of other plaintiffs. This court agrees with the reasoning of the District of Columbia District Court, and will, therefore, look closely at each plaintiff in this case to determine whether he or she may be counted toward the 100-named plaintiff requirement. In the complaint and the motion to add parties, the plaintiffs provide a summary of each plaintiff's claim. These summaries are

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[2] For the purposes of the remainder of this order, the term "named plaintiffs" includes the 129 plaintiffs named in the amended complaint and the 54 additional plaintiffs named in the December 1, 1987 motion to add parties.

attached to this order as Appendix A and made a part of the order by specific reference.

GM asserts that the following groups of plaintiffs cannot be counted toward meeting the 100-named plaintiff requirement: 1) the plaintiffs who purchased cars with 6.2 liter engines, 2) the plaintiffs who allege no mechanical problems whatsoever with their automobiles, 3) the plaintiffs who allege no mechanical problems within the warranty period, 4) the plaintiffs who allege only minor mechanical problems with their cars, 5) the plaintiffs who purchased cars in states which require privity between the purchaser and the warrantor, 6) the plaintiffs who purchased their cars more than four years before the filing of the complaint in a state with a four-year statute of limitations,[3] and 7) the plaintiffs who purchased used cars. The names of the plaintiffs in each group are listed in Appendix B, which is attached to this order and made a part hereof by specific reference.

A. *Plaintiffs who did not purchase cars with 5.7 liter engines*

GM alleges that eleven of the named plaintiffs purchased cars with 6.2 liter engines, and that these plaintiffs' claims cannot be counted toward satisfaction of the 100-named plaintiff requirement. Plaintiffs concede that these eleven plaintiffs, whose names are contained in Group I of Appendix B, state no cause of action, so these plaintiffs will not be counted toward satisfaction of the requirement. After elimination of this group of

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[3] Plaintiff Jack Payne purchased his car in South Carolina more than six years prior to the filing of the complaint. The statute of limitations in South Carolina for filing suits for breach of warranty is six years, but the cause of action does not accrue until the breach is or should have been discovered. S.C. CODE ANN. § 36-2-725 (1976). Therefore, Mr. Payne appears to be within the limitations period, and he will not be excluded from the 100-named plaintiffs on statute of limitations grounds.

plaintiffs, one hundred seventy-two (172) named plaintiffs remain.

B. *Plaintiffs who claimed no mechanical problems with their cars*

The next group of plaintiffs which GM contends must be dismissed is those plaintiffs who allege no mechanical problems with their cars. These plaintiffs are listed in Group II of Appendix B. To address this claim the court must more extensively examine the contours of the implied warranty of merchantability and the Magnuson-Moss Act.

The Magnuson-Moss Act (Act) operates in conjunction with state law to regulate the warranting of consumer products. A consumer product is defined by the Act as "any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes . . . ." 15 U.S.C. § 2301(a) (1982). The Act prescribes the minimum requirements for warranties in consumer transactions and provides a federal forum for resolving large disputes which arise pursuant to a warranty on a consumer product.

The plaintiffs in this case allege a breach by GM of the implied warranty of merchantability. The term "implied warranty" is defined by the Act as "an implied warranty arising under state law in connection with the sale by a supplier of a consumer product." 15 U.S.C. § 2301(7) (1982). Thus, an implied warranty exists for purposes of the Act only if the warranty arises under the law of the state in which the consumer purchased the goods.

In South Carolina,[4] a warranty of merchantability is implied in a contract for the sale of goods if the seller is a merchant with respect to goods of that kind. S.C.

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[4] Most, though not all, of the named plaintiffs purchased their cars in South Carolina.

CODE ANN. § 36-2-314 (1976). In order to be merchantable, goods must be fit for the ordinary purposes for which such goods are used. S.C. CODE ANN. § 36-1-314(2)(c) (1976).

The parties do not dispute, except with respect to purchasers of used cars and purchasers in states which require privity of contract for the implication of the warranty, that an implied warranty of merchantability attached to the cars purchased by the plaintiffs. GM's argument with respect to the plaintiffs in Group II is that they do not claim that the warranty was breached because they allege no mechanical problems with their cars.

The plaintiffs respond that they each have a claim for the reduction in the resale value of the cars which results from the "marketplace reputation these GM diesels earned for their excessively high failure rates." Thus, the plaintiffs claim that a high risk of failure renders these plaintiffs' cars unmerchantable, and the damage they have suffered as a result of the unmerchantability is the reduction in the resale value of the cars.

The court must, therefore, decide if an individual plaintiff may maintain a cause of action for breach of implied warranty of merchantability when his car has operated without incident. In *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595 (S.D.N.Y. 1982), the court addressed a similar argument made by plaintiffs in that case that the likelihood of failure of a tire gave rise to a cause of action for breach of implied warranty in persons who had experienced no problem with their tires. The court concluded, "Plaintiffs' bald assertion that a 'common' defect *which never manifests itself* 'ipso facto caused economic loss' and breach of implied warranty is simply not the law." *Id.* at 603 (emphasis in original).

In *Yost v. General Motors Corp.*, 651 F. Supp. 656 (D.N.J. 1986), the plaintiffs alleged loss of resale value

as a result of the likelihood of an engine oil leak and sought damages based on breach of warranty. The court noted:

> The basic problem in this case is that plaintiff Yost has not alleged that he has suffered any damages. He has not stated that the engine in his vehicle is defective in any way. All he is able to allege is that the potential leak is "likely" to cause damage and "may" create potential safety hazards.

Id. at 657. The court in that case granted GM's motion to dismiss the complaint.

Plaintiffs respond to the arguments of GM by citing several automobile defect cases in which an "all-owners" class was certified even though all owners had not suffered problems with their cars. None of the cases cited by plaintiff specifically holds that a plaintiff can establish a breach of the implied warranty of merchantability by proof of a likelihood of failure of the goods to perform.

In *In the Matter of the Cadillac V8-6-4 Class Action*, 93 N.J. 412, 461 A.2d 736 (N.J. 1983), the court affirmed the certification of an "all-owners" class based on theories of negligence, strict liability, breach of express and implied warranties, violations of the Magnuson-Moss Act, fraud, misrepresentation and refusal to accept recision. *Id.* at ——, 461 A.2d at 741. In *Landesman v. General Motors Corp.*, 42 Ill.App.3d 363, 356 N.E.2d 105 (1976), the court specifically stated that the opinion did not include a ruling on the issue of whether a cause of action on the merits was alleged. *Id.* at ——, 356 N.E.2d at 108. The California appellate court in *Anthony v. General Motors Corp.*, 33 Cal.App.3d 699, 109 Cal. Rptr. 254 (1973), certified an all-owners class but relied on express warranties created by the owners manual and potentially by advertising. In sum, none of these cases which deal

with class certification adequately address the issue presented by GM's motion.

Finally, plaintiffs cite *Walsh v. Ford Motor Co.*, 106 F.R.D. 378 (D.D.C. 1985), as a case in which a diminished resale value class was certified based on the implied warranty of merchantability. That case presents further problems, however. First, it is not clear that the case involved an implied warranty of limited duration. Second, the certification was vacated on appeal because the district court was erroneously "swayed by the view . . . that Congress sought to facilitate class actions under Magnuson-Moss, and therefore expected an indulgent approach by judges to Rule 23(b)(3) certifications." *Walsh v. Ford Motor Co.*, 807 F.2d 1000 (D.C. Cir. 1986).

The court notes that Rule 23(a) does not direct the court to analyze the merits of the plaintiffs' case in addressing a motion to certify a class. Contrarily, the rule provides that the court must consider the following prerequisites to certification:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately represent the interest of the class.

Fed.R.Civ.P. 23(a). The initial certification of the class in *Walsh* cannot, therefore, be treated as a determination that the plaintiffs in that case had a viable claim on the merits.[5]

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[5] The district court in *Walsh* denied a motion to dismiss the complaint in *Walsh v. Ford Motor Co.*, 588 F. Supp. 1513 (D.D.C. 1984). With respect to the implied warranty claims, the motion was based on privity requirements of the various states in which the plaintiffs purchased their automobiles. The court did, however, hold that fifty-seven plaintiffs who failed to allege transmission

The warranty of merchantability guarantees that the warranted goods are fit for the ordinary purposes for which they are used. Thus, in this case, GM warranted that the cars it manufactured would be fit for driving and transportation. GM did not warrant to each purchaser that every other purchaser's car would be fit. As plaintiffs themselves point out, the alleged loss in resale value results from the poor reputation of the cars not from a manifest defect in any of the cars which have experienced no mechanical problems.

Stating that the loss in resale value evidences unmerchantability really places the cart before the horse. Only if a plaintiff first establishes that his or her car was of unmerchantable quality might he or she recover damages. Because the plaintiffs in Group II cannot establish that their cars were not fit for the ordinary purposes for which cars are used, these plaintiffs' claims must be dismissed.

Group II contains seventeen plaintiffs. The claims of four of these plaintiffs were subtracted previously because they purchased cars with 6.2 liter engines. Therefore, an additional thirteen plaintiffs who alleged no mechanical difficulty must be subtracted leaving one hundred fifty-nine (159) surviving plaintiffs.

C. *Plaintiffs who allege no problems occurring within the warranty period*

The plaintiffs in Group III allege no mechanical problems occurring within the warranty period. The Magnuson-Moss Act provides that "implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the war-

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malfunctions within the warranty period could not maintain their written warranty claims.

ranty." 15 U.S.C. § 2308(b) (1982). For model years 1981 and 1982, the implied warranty was limited to twenty-four (24) months or twenty-four thousand (24,000) miles. For model years 1983-1985, the implied warranty was limited to thirty-six (36) months or fifty thousand (50,000) miles.

One hundred eight (108) plaintiffs allege no problem occurring within the warranty period. Plaintiffs do not argue that the method of limitation did not comply with the Act. Rather, plaintiffs' response is twofold. First, plaintiffs claim that the limitation is unconscionable because GM knew of the defect when it sold the cars with diesel engines. Second, plaintiffs again allege that each plaintiff has a diminished resale value claim even if no problem occurred within the warranty and the warranty is reasonable.

Plaintiffs claim that the warranty limitations were unconscionable and of unreasonable duration because GM knew when it sold the cars that the diesel engines were defective. At least two courts have faced this same argument in class actions based on express warranties and have reached different conclusions.

In *Alberti v. General Motors Corp.*, 600 F. Supp. 1026 (D.D.C. 1985), the court allowed plaintiffs whose problems manifested themselves after expiration of an express warranty to maintain an action based on allegations that the defendant knew of the alleged defects prior to sale.

The Second Circuit reached a contrary conclusion in *Abraham v. Volkswagen of America, Inc.*, 795 F.2d 238 (1986). In that case, the court noted:

> [V]irtually all product failures discovered in automobiles after expiration of the waranty can be attributed to a "latent defect" that existed at the time of sale or during the term of the warranty. All parts will wear out sooner or later and thus have a

> limited effective life. Manufacturers always have knowledge regarding the effective life of particular parts and the likelihood of their failing within a particular period of time. Such knowledge is easily demonstrated by the fact that manufacturers must predict rates of failure of particular parts in order to price waranties and thus can always be said to "know" that many parts will fail after the warranty period has expired. A rule that would make failure of a part actionable based on such "knowledge" would render meaningless time/mileage limitations in a warranty coverage.

Id. at 250.

The Second Circuit declined to follow *Alberti* because in its opinion, the court in *Alberti* erroneously applied implied warranty notions in the express warranty context. Clearly, therefore, the Second Circuit did not intend to express an opinion as to whether views announced in *Abraham* would apply in the implied warranty context.

Even though the court recognizes the distinction between express and implied waranties, it finds the reasoning of the Second Circuit equally applicable in the case at bar. Congress expressly provided for the durational limitation of implied waranties. 15 U.S.C. § 2308(b) (1982). The argument advanced by plaintiffs renders this provision meaningless.

A durational limitation on an implied warranty can mean only that the manufacturer warrants that the car is fit for ordinary purposes only for the duration of that warranty. In other words, the limitation can mean only that the unmerchantability must manifest itself in some manner during the period of the warranty in order for the purchaser to have a cause of action.

If the court accepted plaintiffs' argument, a plaintiff would need only to show that a manufacturer knew that a product would fail some time after the expiration of

the implied warranty in order to recover for unmerchantability. As pointed out by the Second Circuit, this showing would rarely be difficult, and, thus, the time/mileage limitation on the warranty which Congress expressly permits would be rendered meaningless.

Turning to the specific limitations periods in this case, the court has no problem concluding that the time and mileage limits are reasonable and not unconscionable. In a class action differing from this case only in the model years of the cars involved, a United States Magistrate found a one-year/12,000 mile warranty limitation reasonable. *Kaplan v. General Motors Corp.*, No. 81-CV-1252 (E.D.N.Y. 1983). The warranties in the instant case last longer than those found reasonable in the *Kaplan* case, and this court finds that the limitations are both reasonable and conscionable.

Finally, the court turns once again to the plaintiffs' argument that this group of plaintiffs each has a claim for diminished resale value, and again the court rejects the argument. None of the plaintiffs in Group III establishes a breach of the implied warranty of merchantability because they allege no mechanical problem within the warranty period. The reasoning of the court with respect to the diminished resale value argument in connection with the plaintiffs who allege no mechanical difficulty applies equally to these plaintiffs.

For the above reasons, the plaintiffs contained in Group III do not state a cause of action, and they will not be counted towards reaching one hundred named plaintiffs. Group III contains one hundred eight (108) plaintiffs. Charles E. Blau will still be counted at this point because he alleges no difficulty within the warranty period with respect to only one of the two GM 5.7 liter diesel engine cars which he purchased. Plaintiff E. M. Hanna has been previously discounted because he did not purchase a car with a 5.7 liter engine. Therefore, not counting this group of plaintiffs excludes one hundred six

(106) parties leaving only fifty-three (53) named plaintiffs with viable claims.

It is now obvious that the remaining plaintiffs cannot satisfy the 100-named plaintiff requirement, and the action cannot, therefore, be maintained as a class action. Plaintiffs asked the court to permit another attempt to add plaintiffs whose claims might be counted toward satisfying the 100-named plaintiff requirement. The court refuses, however, to give the plaintiffs a fourth bite at the apple.

The original complaint named 101 plaintiffs, the amended complaint named 129 plaintiffs, and by this order, the court has allowed the plaintiffs to add 54 more plaintiffs. Significantly, these last 54 plaintiffs were submitted after the motion to dismiss and the grounds therefor were made aware to defendants [*sic*], and the court has already had to discount the claims of 49 of these plaintiffs. For these reasons, the court refuses to give the plaintiffs leave to amend the complaint to add parties. Plaintiffs ask the court as an alternative to dismissal to permit joinder of the remaining plaintiffs so that the case might proceed as a non-class action. The court now turns to that issue.

III. *Plaintiffs' request to permit joinder of the remaining plaintiffs' claims*

A federal court has jurisdiction of actions brought under the Magnuson-Moss Act only if the value of each plaintiff's claim is at least twenty-five dollars and the sum of all claims is at least $50,000. 15 U.S.C. § 2310 (d) (3) (1982). Fed.R.Civ.P. 20 provides in pertinent part:

> All persons may join in one action as plaintiffs if they assert a right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transac-

> tions or occurrences and *if any question of law or fact common to all these persons will arise in the action.*

(Emphasis added).

All of the plaintiffs remaining allege that the 5.7 liter diesel engines which powered the cars they purchased were defectively designed. Furthermore, the Magnuson-Moss Act obviously contemplates the joinder of claims of purchasers of similar goods who allege a breach of an implied warranty against a manufacturer. Questions of design defect will be common to each plaintiff's claim, and the court concludes that the interests of justice are best served by permitting joinder of these claims. The court next turns to the remaining plaintiffs to determine whether any more of them should be dismissed for the additional reasons stated by defendant.

A. *Plaintiffs who allege only minor mechanical problems with their cars*

Ten of the remaining plaintiffs state mechanical problems which the defendant characterizes as minor. Defendant argues that these minor defects do not constitute a breach of the implied warranty of merchantability.

This argument differs from GM's previous arguments in that it asks the court to assess the degree of the defect alleged. Previous arguments were based on propositions of law that were not fact specific, i.e. a plaintiff either alleged a defect within the warranty period or he did not. The court declines to assess the merits of the claims of those plaintiffs who have alleged mechanical difficulties within the warranty period. The determination of what degree of defect constitutes a breach of the warranty is one for the jury. The claims of the plaintiffs in Group IV of Appendix B who have yet to be dismissed will not be dismissed for this reason.

B. *Plaintiffs who purchased cars in states which require privity between the purchaser and the warrantor*

GM alleges and the plaintiffs do not dispute that those plaintiffs who purchased their automobiles in states which require privity of contract for implication of the warranty of merchantability must be dismissed. The dispute arises in the context of which states require privity. Of the plaintiffs remaining, two purchased their cars in North Carolina, and one purchased in California.

1. North Carolina

The District of Columbia district court found in *Walsh*, 588 F. Supp. 1513, that North Carolina does not require privity in implied warranty claims. The defendant claims that that court misread the North Carolina cases on the subject. GM cites the case of *McCollum v. Grove Manufacturing Co.*, 58 N.C. App. 283, 293 S.E.2d 632 (1982) for the proposition that privity is still required in North Carolina.

In the case of *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982), the North Carolina Supreme Court held that privity was not required between manufacturer and purchaser when an express warranty was created between the parties by advertising. The court relied on its recognition of the unnecessary expense in the "privity bound procedure whereby the purchaser claims against the retailer, the retailer against the distributor, and the distributor against the manufacturer." *Id.* at ——, 293 S.E.2d at 414. Furthermore, the court "deemed it appropriate that privity is not required in view of the Legislative abolition of the privity requirement in products liability actions against a manufacturer for breach of implied warranty as of 1 October 1979."

The *McCollum* case is distinguishable from *Bernick* on two grounds. First, the complaint in *McCollum* was

filed prior to the enactment of the product liability statute. *McCollum* at ——, 293 S.E.2d at 638, n. 3. Secondly, no express warranty arose between the buyer and the manufacturer in that case. *Id.* at ——, 293 S.E.2d at 638.

The case at bar was filed after the enactment of the North Carolina products liability statute, and an express warranty did exist between the North Carolina plaintiffs and GM. For these reasons, the court concludes that privity of contract is not required in the implied warranty claims of the two North Carolina purchasers.

2. California

California does still require privity of contract in most implied warranty cases. However, Cal.Civ.Code §§ 1791 (a) and 1791.1(d), which the *Walsh* court relied on in finding that California did not require privity, establish that privity is not required in California consumer implied warranty cases.

For the above reasons, the claims of Lewis O. Beck, Jr., Ruth D. Cooke, and Kathleen Holliday will not be dismissed for lack of privity.

C. *Plaintiffs who purchased their cars more than four years before the filing of the complaint in a state with a four-year statute of limitations*

Three of the remaining plaintiffs purchased their cars in states which adopted the four-year statute of limitation of the Uniform Commercial Code. Ruthe D. Cooke purchased her car in North Carolina, Kathleen Holliday purchased her car in California, and George Massey, Sr. purchased his car in Georgia. *See* N.C. GEN. STAT. § 25:2-725 (1986), Cal. Com. Code § 2725 (West 1964 & Supp. 1986), GA. CODE ANN. § 109A-2-725 (Harrison 1986). Plaintiffs Cooke and Massey do not allege a purchase date, but they do allege that they purchased

their vehicles within the statute of limitations period. Their claims are not facially invalid, and the court will not dismiss these plaintiffs at this time.

Plaintiff Kathleen Holliday purchased her car on March 24, 1981. Clearly, if the California four-year statute of limitations applies, her claim is barred. A South Carolina court would apply its own statute of limitations to any suit brought in that court. In *State v. Southern Farm Bureau Life Ins. Co.*, 265 S.C. 402, 219 S.E.2d 80 (1975), the court stated, "The trial judge correctly held that the law of lex fori is controlling in considering the statute of limitations, regardless of where the cause of action arose . . . ." *Id.* at ——, 219 S.E.2d at 85.

GM urges the court to apply federal choice of law analysis to conclude that the statute of limitations of the state of purchase must apply. GM's arguments may have made sense had the action proceeded as a class action and South Carolina non-residents were included in the class. However, all of the remaining plaintiffs are South Carolina residents. South Carolina has indicated categorically that it will apply its own statute of limitations in cases in its courts. GM directs the court to no interest of any other state which would trump the strong South Carolina policy. Therefore, the court concludes that the interest analysis appropriate for federal choice-of-law decisions weighs in favor of applying the South Carolina statute of limitations, and Kathleen Holliday's claim will not be dismissed.

D. *Plaintiffs who purchased used cars*

Finally, GM claims that those plaintiffs who purchased used cars have no claim for breach of implied warranty. GM reasons that it is not a merchant of used cars, and the warranty, therefore, never arose with respect to used car purchasers.[6]

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[6] A warranty of merchantability arises in a particular case only if the seller is a merchant with respect to goods of the kind in-

The fallacy of GM's argument is that it contradicts the express language of the Magnuson-Moss Act. The Act defines a "consumer" as "a buyer . . . of any consumer product, [or] any person to whom such product is transferred during the duration of any implied or written warranty . . . applicable to the product." Any person who purchased a used car within the warranty period may, therefore, maintain a Magnuson-Moss action against the warrantor. The claims of the plaintiffs listed in Group VII and remaining in the suit will not be dismissed.

E. *Conclusion*

Fifty-three plaintiffs remain in the suit after consideration of all of GM's grounds for dismissal of these claims. The court must next turn to the amount in controversy question raised by the Magnuson-Moss Act. The Act provides that a suit may not proceed under the Act unless the amount in controversy of each plaintiff exceeds $25, and the overall amount in controversy exceeds $50,000.

The United States Supreme Court held, "It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *St. Paul Mercury Indemnity Co. v. Red Cab. Co.*, 303 U.S. 283, 288 (1938). This holding was reaffirmed more recently in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 276 (1977).

Several of the fifty-three remaining plaintiffs allege a specific amount of unreimbursed repair expense. The total of these alleged unreimbursed expenses is $41,615.18. The remaining plaintiffs allege an unspecified amount of unreimbursed repair expense, and all plaintiffs seek to recover the diminished resale value of their cars. It does not appear to a legal certainty that the claim at

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volved in the transaction. S.C. CODE ANN. § 36-2-314(1) (Law Co-op. 1976).

this point is for less than fifty thousand dollars, nor does it appear that the claim of any plaintiff is less than twenty-five dollars. Therefore, the court declines at this point to dismiss the complaint for failure to satisfy the amount in controversy requirements of the Act.

For the foregoing reasons, it is, therefore,

ORDERED, that the motion of General Motors Corporation to strike the amended complaint be, and the same is hereby, denied. It is

ORDERED FURTHER, that the motion of plaintiffs to add and drop parties be, and the same is hereby, denied. It is

ORDERED FURTHER, that the motion of plaintiffs to add parties be, and the same is hereby, granted. It is

ORDERED FURTHER, that the motion of General Motors Corporation to dismiss the amended complaint be, and the same is hereby, granted in part and denied in part. It is

ORDERED FURTHER, that the claims of one hundred thirty plaintiffs be, and the same are hereby, dismissed.[7] It is

ORDERED FURTHER, that the claims of the fifty-three (53) parties listed in Appendix C shall be joined and the case shall proceed as a non-class action.

AND IT IS SO ORDERED.

/s/ Falcon B. Hawkins
FALCON B. HAWKINS
United States District Judge

Charleston, S. C.
April 2, 1988

[Appendix to opinion of district court omitted]

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[7] The names of these plaintiffs are contained in Appendix D which is attached to this order and made a part hereof by specific reference.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 88-2168

MARY A. CARLSON; ROMANA STAZEN; KENNETH OWENS; RICHARD B. ALLEN; C.V. ALSTON; CHARLES ARMOUR, JR.; PIERCE BEAUZAY; LEWIS O. BECK; CLAUDE A. BLACK; CHARLES A. BLAU; RAYMOND E. BOOKER; ROBERT L. BRANHAM; THOMAS R. BROWN; DAVIS W. BRUNSON, SR.; WILLIAM E. BUBSEY; JIMMY B. BURRELL; THOMAS H. BURRELL; FRANK CARRUTH; WILLIE CASEY, SR.; JAMES F. CAUSEY; LEVI CHAVOUS; RUTH D. COOKE; JAMES W. DAVIS; JOHN E. DRIGGERS; WILLIAM E. DUKES; ADELAIDE DUPRE; DOUGLAS T. ELKINS; BERNEST ELLERBE; LOIS ELMORE; JOHN ERICKSON; DON EYKYN; MARY J. FAHEY; LESLIE E. FIGA, DR.; GEORGE W. FULMER; CHARLAINE GLOVER; LOUISE GRADY; H.M. GRICE; GROOMS OIL COMPANY; DENNIS HARRISON, JR.; JOHN HARTE; DOYLE C. HAYDEN; LILLIAN HAYES; GEORGE HENDRICKS; JESSE HERRON; G.E. HINSON; FLOYD HIOTT; KATHLEEN HOLLIDAY; ROBERT HUDSON; PAUL HUGHES, JR.; ALFREDA JAMES; LARRY JENKINS; HENRY S. JOHNSON; GEORGE C. KOSKO; JIM LEATHENWOOD; ROBERT H. LEHMAN; MICHAEL R. LEPORS; BOBBY G. LOTT; JOE LUBELSKY; T.W. LYBAND; DANIEL L. MCALPIN; DAVID MCLELLAN; PURDY MCLEOD; MARVIN MABRY; WILLIAM MAPP, JR.; ROBERT MARINA, JR.; ELIZABETH J. MARTIN; W. MASON, JR.; GEORGE MASSEY, SR.; SAMUEL MASTERS; ELIZABETH MAUNEY; JAMES E. MAYS; VICKI MAYS; MERLE MELLINS; FRED MEYERS; W. IRVIN MOLONY; DR. CARL MOORE; HARRY MORROW; PHILLIP NOEL; THOMAS O'CONNOR; BILLY PARKER; JACK L. PAYNE; RICH-

ARD PEARL; ZELMA PETTIT; T.H. PRESTON; HAROLD B. PRUITT; RICHARD PUCKHARBER; LAURIE QUINN; ROBERT G. RICHARDS; WALTER L. ROARK, JR.; DANIEL RUNION, REV.; OSCAR RUSSELL; ROBERT F. SCHOLL; LIVINGSTON SCOTT; FRANK D. SELLERS; JIMMY SHEORN, JR.; F.L. SHULER, DR.; IRENE F. SIMPSON; HENRY R. SIMS; PAUL C. SOVA; ALEX STACKHOUSE, JR.; SUNBELT THREAD & TAPE, INC.; ANN STERNE; JOSHUA TAYLOR; PAUL THODE; ANN THODE; BERNICE TODD; DORETHA J. TODD; MARY TORRENCE; EARLY VINCENT; DONALD WADE; WILLIAM WEATHERS, DR.; DAVID WEIGLE, MRS.; GEORGE E. WHITE; LEROY WHITE; HORACE WHITMIRE; MARVIN WILLIAMS; DAVID J. WORTHINGTON; ROY C. YOUNG; COLUMBIA WHOLESALE COMPANY; DAVID FERGUSON; ROBERT E. MALPASS; WILLIAM J. SHEPARD, JR.; CARL SHOKES,

Plaintiffs-Appellants,

and

VIVIAN CHESTER; HENRY H. FREUDENBERG; ROBERT GOTTERBA; E.M. HANNA; GERALD HARLEY; S. TODD and JUDY LEWIS; KAREN LUCAS; COURTNEY PLANTE; W.H. SINGLETON; R.C. SMITH, MAJOR; BERNETA THAMES,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

[Filed Sept. 27, 1989]

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips with the concurrence of Judge Chapman and Judge Williams.

For the Court

/s/ John M. Greacen
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 88-2168

MARY A. CARLSON; ROMANA STAZEN; KENNETH OWENS; RICHARD B. ALLEN; C.V. ALSTON; CHARLES ARMOUR, JR.; PIERCE BEAUZAY; LEWIS O. BECK; CLAUDE A. BLACK; CHARLES A. BLAU; RAYMOND E. BOOKER; ROBERT L. BRANHAM; THOMAS R. BROWN; DAVIS W. BRUNSON, SR.; WILLIAM E. BUBSEY; JIMMY B. BURRELL; THOMAS H. BURRELL; FRANK CARRUTH; WILLIE CASEY, SR.; JAMES F. CAUSEY; LEVI CHAVOUS; RUTH D. COOKE; JAMES W. DAVIS; JOHN E. DRIGGERS; WILLIAM E. DUKES; ADELAIDE DUPRE; DOUGLAS T. ELKINS; BERNEST ELLERBE; LOIS ELMORE; JOHN ERICKSON; DON EYKYN; MARY J. FAHEY; LESLIE E. FIGA, DR.; GEORGE W. FULMER; CHARLAINE GLOVER; LOUISE GRADY; H.M. GRICE; GROOMS OIL COMPANY; DENNIS HARRISON, JR.; JOHN HARTE; DOYLE C. HAYDEN; LILLIAN HAYES; GEORGE HENDRICKS; JESSE HERRON; G.E. HINSON; FLOYD HIOTT; KATHLEEN HOLLIDAY; ROBERT HUDSON; PAUL HUGHES, JR.; ALFREDA JAMES; LARRY JENKINS; HENRY S. JOHNSON; GEORGE C. KOSKO; JIM LEATHENWOOD; ROBERT H. LEHMAN; MICHAEL R. LEPORS; BOBBY G. LOTT; JOE LUBELSKY; T.W. LYBAND; DANIEL L. MCALPIN; DAVID MCLELLAN; PURDY MCLEOD; MARVIN MABRY; WILLIAM MAPP, JR.; ROBERT MARINA, JR.; ELIZABETH J. MARTIN; W. MASON, JR.; GEORGE MASSEY, SR.; SAMUEL MASTERS; ELIZABETH MAUNEY; JAMES E. MAYS; VICKI MAYS; MERLE MELLINS; FRED MEYERS; W. IRVIN MOLONY; DR. CARL MOORE; HARRY MORROW; PHILLIP NOEL; THOMAS O'CONNOR; BILLY PARKER; JACK L. PAYNE; RICH-

ARD PEARL; ZELMA PETTIT; T.H. PRESTON; HAROLD B. PRUITT; RICHARD PUCKHARBER; LAURIE QUINN; ROBERT G. RICHARDS; WALTER L. ROARK, JR.; DANIEL RUNION, REV.; OSCAR RUSSELL; ROBERT F. SCHOLL; LIVINGSTON SCOTT; FRANK D. SELLERS; JIMMY SHEORN, JR.; F.L. SHULER, DR.; IRENE F. SIMPSON; HENRY R. SIMS; PAUL C. SOVA; ALEX STACKHOUSE, JR.; SUNBELT THREAD & TAPE, INC.; ANN STERNE; JOSHUA TAYLOR; PAUL THODE; ANN THODE; BERNICE TODD; DORETHA J. TODD; MARY TORRENCE; EARLY VINCENT; DONALD WADE; WILLIAM WEATHERS, DR.; DAVID WEIGLE, MRS.; GEORGE E. WHITE; LEROY WHITE; HORACE WHITMIRE; MARVIN WILLIAMS; DAVID J. WORTHINGTON; ROY C. YOUNG; COLUMBIA WHOLESALE COMPANY; DAVID FERGUSON; ROBERT E. MALPASS; WILLIAM J. SHEPARD, JR.; CARL SHOKES,

Plaintiffs-Appellants,

and

VIVIAN CHESTER; HENRY H. FREUDENBERG; ROBERT GOTTERBA; E.M. HANNA; GERALD HARLEY; S. TODD and JUDY LEWIS; KAREN LUCAS; COURTNEY PLANTE; W.H. SINGLETON; R.C. SMITH, MAJOR; BERNETA THAMES,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

[Filed Oct. 24, 1989]

ORDER

Upon consideration of the appellants petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Phillips with the concurrence of Judge Chapman and Judge Williams.

For the Court,

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Clerk

APPENDIX E

In addition to Mary Carlson, the named plaintiffs who were parties in the court of appeals are Romana Stazen, Kenneth Owens, Richard B. Allen, C.V. Alston, Charles Armour, Jr.; Pierce Beauzay, Lewis O. Beck, Claude A. Black, Charles A. Blau, Raymond E. Booker, Robert L. Branham, Thomas R. Brown, Davis W. Brunson, Sr., William E. Budsey, Jimmy B. Burrell, Thomas H. Burrell, Frank Carruth, Willie Casey, Sr., James F. Causey, Levi Chavous, Ruth D. Cooke, James W. Davis, John E. Driggers, William E. Dukes, Adelaide Dupre, Douglas T. Elkins, Bernest Ellerbe, Lois Elmore, John Erickson, Don Eykyn, Mary J. Fahey, Dr. Leslie E. Figa, George W. Fulmer, Charlaine Glover, Louise Grady, H.M. Grice, Grooms Oil Company, Dennis Harrison, Jr., John Harte, Doyle C. Hayden, Lillian Hayes, George Hendricks, Jesse Herron, G.E. Hinson, Floyd Hiott, Kathleen Holliday, Robert Hudson, Paul Hughes, Jr., Alfreda James, Larry Jenkins, Henry S. Johnson, George C. Kosko, Jim Leathenwood, Robert H. Lehman, Michael R. Lepors, Bobby G. Lott, Joe Lubelsky, T.W. Lybrand, Daniel L. McAlpin, David McLellan, Purdy McLeod, Marvin Mabry, William Mapp, Jr., Robert Marina, Jr., Elizabeth J. Martin, W. Mason, Jr., George Massey, Sr., Samuel Masters, Elizabeth Mauney, James E. Mays, Vicki Mays, Merle Mellins, Fred Meyers, W. Irvin Molony, Dr. Carl Moore, Harry Morrow, Phillip Noel, Thomas O'Connor, Billy Parker, Jack L. Payne, Richard Pearl, Zeima Pettit, T.H. Preston, Harold B. Pruitt, Richard Puckharber, Laurie Quinn, Robert G. Richards, Walter L. Roark, Jr., Rev. Daniel Runion, Oscar Russell, Robert F. Scholl, Livingston Scott, Frank D. Sellers, Jimmy Sheorn, Jr., Dr. F.L. Shuler, Irene F. Simpson, Henry R. Sims, Paul C. Sova, Alex Stackhouse, Jr., Sunbelt Thread & Tape, Inc., Ann Sterne, Joshua Taylor, Paul Thode, Ann Thode, Bernice Todd, Doretha J. Todd, Mary Torrence, Early Vincent, Donald Wade, Dr. William Weathers, Mrs. David Weigle, George

E. White, Leroy White, Horace Whitmire, Marvin Williams, David J. Worthington, Roy C. Young, Columbia Wholesale Company, David Ferguson, Robert E. Malpass, William J. Shepard, Jr., Carl Shokes, Vivian Chester, Henry H. Freudenberg, Robert Gotterba, E.M. Hanna, Gerald Harley, S. Todd and Judy Lewis, Karen Lucas, Courtney Plante, W.H. Singleton, Major R.C. Smith, and Berneta Thames.

APPENDIX F

General Motors Corporation is not a subsidiary of a publicly owned corporation. All subsidiaries of General Motors Corporation are wholly owned except the following:

ACE Limited (Bermuda)
AeroVironment Inc. (USA)
Alambrados Automotrices, S.A. de C.V. (Mexico)
Alambrados y Circuitos Electricos, S.A. de C.V. (Mexico)
AMBRAKE Corporation (USA)
Applied Intelligence Systems, Inc. (USA)
Aralmex, S.A. de C.V. (Mexico)
Asset Leasing GmbH (West Germany)
Automotive Polymer Based Composites Joint Venture and Development Partnership (Co-Partnership among GM, Ford and Chrysler to coordinate basic research on plastic component materials)
Automotive Satellite Television (USA)
Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)
Avis, Inc. (U.S.A.)
Beijing International Information Processing Company, Limited (China)
British Caledonian Flight Training, Limited (England)
Bujias Mexicanas, S.A. de C.V. (Mexico)
Calsonic Harrison Co., Ltd. (Japan)
Comau Productivity Systems, Inc. (USA)
Compagnie de Faisceaux Tunisian International S.A. (Tunisia)
Compania Nacional de Diercciones Automotrices, S.A. de C.V. (Mexico)
Componentes Delfa, C.A. (Venezuela)
Convesco Vehicles Sales GmbH (West Germany)
Daewoo Automotive Components, Ltd. (Korea)
Daewoo Motor Co., Ltd. (Korea)

Delkor Battery Company, Ltd. (Korea)
Detroit Diesel Corporation (USA)
DHB—Componentes Automotivos S.A. (Brazil)
Diffracto Limited (Canada)
Fabrica Colombiana de Automotores S.A. ("Colomotores") (Colombia)
Gemeinnutzige Opel-Wohnbau-Gesellschaft mbH (West Germany)
General Motors Bankgesellschaft mbH (Austria)
General Motors del Ecuador S.A. (Ecuador)
General Motors Kenya Limited (Kenya)
Genie Mecanique Zairose, S.A.R.L. (Zaire)
GM Allison Japan Limited (Japan)
GMFanuc Robotics Corporation (USA)
Group Lotus, plc (England)
Hitachi Data Systems Corporation (USA)
Ilmor Engineering, Ltd. (England)
Industries Mecaniques Maghrebines, S.A. (Tunisia)
Industrija Delova Automobila, Kikinda (Yugoslavia)
Interactive Entertainment, Inc. (Canada)
Isuzu-General Motors Australia Limited (Australia)
Isuzu Motors Limited (Japan)
Isuzu Motors Overseas Distribution Corp. (Japan)
Japan Satellite Communications Network Corporation (Japan)
Kabelwerke Reinshagen GmbH (West Germany)
Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)
Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)
Koram Plastics Company, Ltd. (Korea)
Metal Casting Technology, Inc. (USA)
Motor Enterprises, Inc. (USA)
National Advanced Systems Corporation (USA)
New United Motor Manufacturing, Inc. (USA)

NHK Inland Corporation (Japan)
Omnibus BB Transportes, S.A. (Ecuador)
Promotora de Partes Electronics Automotrices (Mexico)
P.T. Mesin Isuzu Indonesia (Indonesia)
Senalizacion y Accesorios del Automovil Yorka, S.A. (Spain)
Shinsung Packard Company, Ltd. (Korea)
Sung San Company, Ltd. (Korea)
Suzuki Motor Co., Ltd. (Japan)
Tactical Truck Corporation (USA)
View Engineering (USA)
Volvo GM Heavy Truck Corporation (USA)